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No. 12,589

IN THE

United States Court of Appeals

For the Ninth Circuit

L. D. ROACH, as guardian of Arno Liebscher, an insane person,
Appellant,

vs.

MATANUSKA VALLEY FARMER'S COOPERATING ASSOCIATION, a corporation,
Appellee.

Appeal from the District Court, Territory of Alaska, Third Division.

BRIEF OF APPELLEE.

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FILED
JAN 30 1951
PAUL P. O'BRIEN,

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No. 12,589

IN THE

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vs.

MATANUSKA VALLEY FARMER'S COOPERATING ASSOCIATION, a corporation,
Appellee.

Appeal from the District Court, Territory of Alaska, Third Division.

BRIEF OF APPELLEE.

I.

STATEMENT RELATING TO PLEADINGS AND JURISDICTION.

This is an appeal taken by appellant (plaintiff in the lower Court) from a final decree rendered on the 3rd day of March, 1950, by the District Court for the Territory of Alaska, Third Division, in favor of the appellant, L. D. Roach, and against the appellee, Matanuska Valley Farmer's Cooperating Association (R 111-115).

The District Court for the Territory of Alaska is a Court of general jurisdiction and consists of four divisions, of which the Third Division is one. Jurisdiction of the District Court is conferred by Title 48 U.S.C. Sec. 101. See also Alaska Compiled Laws Annotated, 1949 (53-1-1). Jurisdiction of this Court to review the decree of the District Court is conferred by New Title 28 U.S.C., Sections 1291 and 1294.

Appellant in this action as plaintiff below, commenced this action on December 23rd of 1948. The amended complaint consists of two causes of action which I believe can be fairly summarized as claiming the right in appellant to the possession of the property in question under three distinct theories as follows:

First: That the lease made on February 27, 1941, by James R. Campbell as guardian of Arno Liebscher, an incompetent person, to and in favor of Matanuska Valley Farmer's Cooperating Association, the appellee, is absolutely void because, as it is claimed, there is no statutory authority for the making of such lease or for its approval or confirmation by the Court.

Second: That the lease, while not void, is voidable for two separate reasons as follows: (1) Because of the claimed mental incapacity of Mr. Campbell, the guardian, to make the lease in question, and because the appellee allegedly overreached and overpersuaded such guardian in securing the lease, and that the lease was unconscionable, inequitable, and confiscatorial. (2) Along with the last-mentioned proposition is an apparent claim that the lease, even

though satisfactory at first, is voidable now because of change in conditions in that property taxes have risen steadily while cash income has remained constant, and under the terms of the lease will remain constant during such term. Appellant has claimed that plaintiff cannot pay the taxes and that defendant, by building extra buildings, has caused a great increase in taxes, and is deliberately trying to cause the property to be sold for taxes so it can purchase the property at a cheap price. It is further claimed that unless the lease is cancelled, plaintiff will eventually lose the property at tax sale to the damage of his ward, and that plaintiff has no redress except to void the lease if the property is to be saved.

Third: Appellant apparently admits the validity of the lease but claims that appellee has breached the lease and that appellant is entitled to possession of the property by reason of such breach as follows:

1. That appellee breached the lease by constructing a second building on the property, thus raising the taxes beyond the power of appellant to pay.

2. That appellee should have paid the taxes on the buildings it constructed.

3. That appellee failed to carry insurance as provided by the lease.

4. That appellee failed to pay the cash rent of $45, due December 10, 1948, when due.

In answer to plaintiff's amended complaint, defendant admitted that plaintiff was guardian of Arno Liebscher, an incompetent person, maintaining the

action for and on behalf of the incompetent person, and admitted the corporate existence of the defendant. The defendant admitted that the incompetent was the owner of the property in question, and the execution of the lease, and that it was in possession of the property, and denied that such possession was forcible or unjust. Defendant admitted that by the terms of the lease it was granted permission to demolish the buildings on the property and to salvage such of the materials of such buildings as were usable, and specifically denied all the allegations contained in the first cause of action of plaintiff's amended complaint to the effect that the lease was unconscionable, inequitable, etc., or that the defendant over-reached the plaintiff, or that the buildings previously on the property, if kept in a fair state of repair, would have rented for the sum of $6,000. Defendant specifically denied that the guardian acted in excess of and beyond his powers and that the Probate Court had no power to authorize or approve the lease in question. Defendant admitted that the cash income under the terms of the lease amounted to $540 per year and that certain taxes were unpaid by the plaintiff and had become delinquent, and that the property had been advertised for sale, and alleged that defendant had paid taxes for the year 1948 under date of April 4, 1949, and that such payment, including penalty, interest, and costs, amounted to $965.73, and specifically alleged that there were no city assessments for sidewalk and street improvements and repairs charged against the property.

In answer to the second cause of action to plaintiff's amended complaint, defendant denied specifically that it had breached the lease in question and specifically alleged that it had paid its personal property tax for the year 1948 as well as for all other years since the execution of the lease, and alleged that it had expended in excess of $38,000 in buildings and improvements upon the real property in question, all of such improvements to revert to the lessor in accordance with the terms of the lease. Defendant admitted that it was late in making its payment due December 10, 1948, and it alleged that such failure was due to an oversight of one of defendant's employees. Defendant further alleged that on or about December 27, 1948, it tendered its check to plaintiff for such rent and that that check, together with a check for the January, 1949, rent was refused by the plaintiff and returned by the plaintiff. The answer further alleged that all rental payments not accepted had been tendered to the plaintiff and refused, and that such rental payments have been deposited with the Court, together with interest and costs when ascertained, and that it had been ready, willing, and able at all times to pay the monthly rents provided for in the lease, but that in view of plaintiff's attitude, it would be useless to continue sending monthly payments to the plaintiff. The answer states that on several occasions since the date of the lease the defendant had made rental payments after the due date and that such payments had been accepted by the plaintiff, and alleged that by his course of conduct

the plaintiff had waived strict performance of the lease insofar as rental payments were concerned. Defendant further alleged that it was under no duty, by the terms of the lease or otherwise, to pay taxes on the property, and denied that plaintiff was entitled to damages against the defendant or to costs and attorney's fees.

As an affirmative defense, defendant alleged the facts concerning the adjudication of Arno Liebscher as an insane person and the appointment of James R. Campbell as guardian for such insane person. Defendant then alleged the value of the property at the time the guardian was appointed and the condition of the property in 1940, that the premises were often vacant between the time of the appointment of Campbell as guardian and the execution of the first lease to defendant in December of 1940, and alleged the execution of such lease and the subsequent execution of the lease which is the basis of this action, and summarized the provisions of the second lease, and stated that the second lease was expressly approved by the Probate Court. The answer further alleged that in accordance with the terms of the lease defendant had expended in excess of $38,000 in capital improvements upon the property. The affirmative defense of the answer alleged that the plaintiff, L. D. Roach, acted as attorney for James R. Campbell, the former guardian, and actively participated in negotiations for the two leases made to the defendant by such guardian and prepared the lease which is the basis of this suit, together with necessary petitions and orders of the Probate Court in connection there-

with, and that L. D. Roach at all times had full and complete knowledge of the negotiations and of the agreement reached and of the leases executed, and that L. D. Roach, the plaintiff, at no time during negotiation of the lease in question claimed that such lease was unconscionable, inequitable, or confiscatorial, or beyond the power of the guardian to make. The answer further alleged that L. D. Roach has acted as guardian of Arno Liebscher, incompetent, since the 25th day of August, 1941, and at all times had full knowledge of the construction carried on by the defendant and made no objection thereto, that the plaintiff, as guardian, had paid all taxes, including the year 1946 without making any claim prior to that date that the defendant should be paying such taxes or any part thereof, and that the first contract between plaintiff and defendant concerning taxes was not to the effect that defendant should have paid the taxes but that by reason of increase in taxes it was difficult for the plaintiff to pay such taxes out of the cash income of the property. Defendant then claimed that plaintiff was estopped to claim that the lease in question was void or voidable and that if in fact any equitable cause of action ever existed in favor of plaintiff and against defendant that such cause of action should be barred by reason of laches of the plaintiff in failing to commence a suit earlier (R 19-34).

The plaintiff, by his reply, in general denied all the affirmative matter contained in defendant's answer, either upon information and belief or specifically. In such reply plaintiff specifically admitted

that he never at any time during negotiation of the lease in question informed defendant's agents that he believed the lease was unconscionable, inequitable, and confiscatorial, and alleged that he was not duty bound to inform the defendant of anything and was not under any obligation to the defendant to so inform its agents and employees. He also specifically admitted the release of Mr. Campbell, the former guardian, and the appointment of plaintiff as guardian, and that he has acted as guardian since August 25, 1941. Plaintiff further admitted that he had paid taxes on the property as long as there were sufficient funds with which to pay the taxes (R 35-40).

II.

STATEMENT OF THE CASE.

Arno Liebscher, also known as Liebschner, was adjudged incompetent by the Probate Court for the Territory of Alaska, Third Division, Anchorage Precinct, on June 28, 1929, and since that date he has been confined to Morningside Hospital for the insane at Portland, Oregon. On January 6, 1930, James R. Campbell was appointed by such Probate Court as guardian of the person and estate of the said incompetent (R 284). The guardian qualified and letters of guardianship were issued to him on April 6, 1930. The property of the estate consisted of Lot Number 9 of Block Number 23 of the Original Townsite of Anchorage, Alaska. The real property was appraised in the guardianship proceeding at $900.00, including

land and buildings, shortly after the guardian qualified. Personal property in the building was appraised at $100 at the same time (R 215 and 215a, Admissions on Pre-Trial Conference).

The guardian attempted to keep the property rented but the buildings were in a bad state of repair and he found it very difficult over the years to secure and retain tenants, and in some cases found it a difficult matter to collect the rentals even when the property was rented (final account of Guardian Campbell, defendant's Exhibit "N"). During the period between April 6, 1930, and August 15, 1941, Mr. Campbell, as guardian, received a total gross rent of $2,199 for the estate property (final account of Guardian Campbell, defendant's Exhibit "N"). This gross rental figure of $2,199 included $450 for nine months' rent at $45 per month, commencing with December, 1940, received from the defendants under the two leases hereinafter mentioned. Thus the guardian received the sum of $1,794 as gross rentals for the property for the period April, 1930, through November, 1940, a period of one hundred twenty-eight months, or an average of $14 per month.

In December of 1940, immediately prior to the first lease to the defendant, the property was rented by Campbell to one "Louie" at a rental of $10 per month (R 389).

Between the time Campbell qualified as guardian, in April of 1930, and the time of the first lease to defendant, in December of 1940, the personal property originally appraised at $100, belonging to the estate,

had become worn out and valueless (Petition dated December 4, 1940, made for Campbell by plaintiff, defendant's Exhibit "F"). During the same period the buildings then on the property "had depreciated greatly and were in need of extensive and expensive repairs" (defendant's Exhibit "F"), and were in a dilapidated and unsafe condition (finding contained in order of Probate Court dated February 24, 1941, approving second lease, defendant's Exhibit "J").

The property, including land and buildings, was assessed by the City of Anchorage for the year 1941 as of September 30, 1940, at a value of $1,500 (plaintiff's Exhibit 1).

Late in the year 1940 defendant association purchased a dairy business and desired to secure business quarters in Anchorage. Mr. Stock, defendant's manager, and other officials of defendant, made inquiries around Anchorage to locate a suitable location. They inspected two or three premises which would have been suitable and which could have been secured on long-term leases (R. 358, 476). Then Mr. Stock learned that Mr. Campbell controlled some property which might be suitable for defendant's purpose and contacted Mr. Campbell. Mr. Stock discussed his plans with Mr. Campbell and learned that Campbell would be interested in leasing the property and went and looked the property over (R 359). He contacted Mr. Campbell again, and discussed defendant's plans concerning the property and the terms of a possible lease of the premises with him. Mr. Stock offered $30 a month rent and Campbell didn't think that was

enough. Judge Price was the United States Commissioner and ex-Officio Probate Judge at that time and Campbell and Judge Price settled on a rental of $45 per month for the property (R 363). Mr. Stock discussed with Mr. Campbell the length of the proposed lease and the right to rebuild the old building or to build a new building and came to an agreement as to a lease. Stock had several conversations with Campbell about the proposed lease and at the request of Mr. Campbell he discussed the matter with Judge Price several times. Campbell also discussed the matter with Judge Price. Mr. Campbell at all times seemed to know what he was doing (R 364-365). As a result of the various discussions, a rough draft lease was drawn on behalf of defendant and that was discussed by Campbell and Judge Price and Stock as a basis of what should go into the final draft (R 364, 380).

Meanwhile, Mr. Campbell contacted Mr. Roach some considerable time prior to December 2, 1940, and discussed the matter with him (R 491) and told him he wished to lease the estate property to defendant (R 290).

Under date of December 2, 1940, Mr. Roach wrote Mr. Rasmussen, secretary of defendant, to the effect that Campbell had instructed him to proceed with the lease but that he had not located the Court file and that the matter was being held up while search was being made (plaintiff's Exhibit 14, R 494).

Subsequently, Mr. Roach located the Court file on the guardianship in Mr. Cuddy's office, along with

personal files left by Mr. Morton who had formerly been acting as attorney for Mr. Campbell in the matter (R 290, 492, 493).

Somewhere in the course of the negotiations, Mr. Campbell gave the rough-draft lease above mentioned to Mr. Roach with directions to Mr. Roach to follow it in drawing a lease between Campbell, as guardian, and the defendant association (R 292). The rough-draft lease herein mentioned is plaintiff's Exhibit 12. Expiration date of the rough-draft lease had been changed in pencil from December 1, 1955, to December 1, 1950, and that change probably was made at the direction of Mr. Campbell, the guardian (R 495). Mr. Roach then proceeded to prepare the final draft of the first lease (R 294, 327, 328).

After completion of the final draft of the lease, officials of defendant corporation made an appointment to meet with Mr. Campbell. On December 6, 1940, Mr. Stock, manager, Mr. Brix, president, and Mr. Rasmussen, secretary of defendant association, drove from Palmer to Anchorage, arriving in Archorage early in the forenoon (R 367, 478). Mr. Stock and Mr. Rasmussen testified they picked up Tom Donohoe, association attorney, and the four went to Campbell's house (R 396, 478). Roach wasn't there (R 367, 478) and Campbell insisted that nothing be done until Roach came (R 367). Stock and Rasmussen went and got Mr. Roach (R 367, 395, 479). Campbell read the lease and went over it with them and they all signed it (defendant's Exhibit "H", R 366, 367, 479-481). This lease, in brief, leased Lot 9 of

Block 23, Original Townsite of Anchorage, Alaska, to defendant for a term of ten years and one month at a monthly rental of $45 per month, payable in advance on the tenth day of each month, required defendant to make all necessary repairs at its own expense, and authorized but did not require the defendant to make any alteration it saw fit and to erect an entire new building or buildings. Mr. Campbell knew what was going on and appeared to understand what was said about the lease (R 365, 480). Mr. Roach and Anna Campbell, the wife of James R. Campbell, witnessed the lease and Mr. Roach took the acknowledgements of Mr. Campbell, as Lessor, and of Mr. Brix and Mr. Rasmussen on behalf of defendant (R 379). This lease was dated December 6, 1940, and is defendant's Exhibit "H". Neither Campbell nor Roach nor any of those present suggested any dissatisfaction with the lease as drawn (R 481).

Mr. Roach denies that Tom Donohoe was present when the lease was signed but it is admitted all around that Mrs. Campbell, Mr. Roach, Mr. Brix, Mr. Rasmussen, and Mr. Stock were present at that time in addition to Mr. Campbell (R 333, 365).

Prior to the signing of the first lease, as above set out, Mr. Roach prepared a petition to the Probate Court on behalf of Mr. Campbell for order to lease, and presented with such petition a copy of the proposed lease (defendant's Exhibit "F", R 328). Under date of December 5, 1940, the Probate Court specifically found that it was for the advantage and the best interest of the estate to enter into the lease,

and specifically authorized the guardian to execute a lease of the estate premises substantially in the form of the lease presented (defendant's Exhibit "G").

Defendant-appellee took possession of the estate property as soon as satisfactory arrangements could be made with "Louie", the person then in possession, and has remained in possession to the present time (R 381, admissions as to possession in answer).

The building on the property when defendant took possession of it in December of 1940 or January of 1941 consisted of two prefabricated buildings side by side, surrounded by a wall consisting of rough lumber standing on end (R 220, 221, 222, 359, 361, 401, 403). The entire affair was roughly fifty feet wide by forty or forty-five feet in depth (R 220, 360, 390), and covered by a shed type roof, also constructed of rough lumber (R 221, 222, 361, 403). It had no central heating (R 360, 403). It had no plumbing (R 360, 403). Such electric wiring as there was in the building consisted of wires strung here and there on the ceiling with drop cords for lighting fixtures (R 403-404). It had no foundation but was set on blocks. The floor joists had rotted away at the ends and the floor was humped up in the middle and sagged down at each side (R 402). The building was in such a bad state of repair that the City of Anchorage would not grant a permit to rehabilitate it (R 360).

Defendant set about ways and means of tearing down the old building and constructing a new one.

The ten years remaining of the original lease dated December 6, 1940, would not justify the expenditure necessary to construct the new building necessary and so Mr. Stock contacted Mr. Campbell regarding a new lease which would be generally the same as the old one except for a term of fifteen years instead of ten, and except that defendant would bind itself to build a new building which would revert to the estate (R 368, 369, 481, 482). Discussions as to the new lease were also had between Mr. Stock and Judge Price and an agreement was reached as to a new lease (R 369, 370). Mr. Roach was again called in by Mr. Campbell on February 12, 1941, and instructed to prepare a new lease, which he did (R 296, 297). Mr. Stock and Mr. Roach discussed the new lease with Judge Price (R 370, 496). Roach for Campbell prepared and on February 24, 1941, presented a petition to the Probate Court requesting authority to execute the new lease extending the term "in consideration of the new building to replace the present ones which are in a dilapidated condition" (defendant's Exhibit "I"), and presented certain evidence to the Court in support of the petition. Mr. Roach drew and on February 24, 1941, had the Court sign an order authorizing new leases (R 496, defendant's Exhibit "J"). The Court found that the buildings then on the property were in a dilapidated and unsafe condition and that it was "to the advantage of and in the best interests of the estate to grant an extended term in consideration of the expensive improvements to be made that will eventually revert to the estate," and

authorized a lease for fifteen years from the date of the lease. Such lease was to provide for a rental of $45 per month and was to be substantially in the same form as the lease previously executed between the same parties, but was to bind the lessee to commence and to complete upon the leased premises a building to cost not less than $15,000, and to provide that the building would revert to the estate (defendant's Exhibit "J").

Mr. Roach testified that on February 25, 1941, he discussed the proposed lease with Campbell and suggested that the lease should provide that the lessee would pay the taxes and objected to other things in the proposed lease, and that Campbell became angry with him and said, "Some years I paid them myself", referring to the taxes (R 297, 496). The next day Roach took the proposed lease to Judge Price to be approved and made a date to have it signed the following day (R 496). The parties got together at Campbell's house on February 27. Present at that time were Mrs. Campbell, Mr. Roach, Mr. Brix, Mr. Stock, and Mr. Rasmussen, in addition to Mr. Campbell (R 370, 483). Campbell read the lease to satisfy himself of its contents. The details had all previously been worked out in conference between the parties and their attorneys and the probate judge (R 371). The parties all went over the proposed lease and signed it (R 371, 483). No dissatisfaction with the lease was expressed by anyone present (R 484). Mr. Campbell took part in the discussion, appeared to understand the conversations, and appeared to know what was going on (R 372, 484), and was thoroughly

familiar with the terms of the lease (R 372). At the time he signed the first lease, he seemed quite pleased, because he was not getting much money out of the tenant then in the property and wanted to get a good lease where he could get the money and be sure of it, and the witness Stock couldn't see any difference in him when the second lease was signed (R 372).

The second lease above mentioned was dated February 27, 1941, and is in evidence as defendant's Exhibit "K". Signatures of Campbell as lessor, and of Brix and Rasmussen for the lessee, were likewise witnessed by Mrs. Campbell and Mr. Roach, and acknowledgments of both parties were taken by Mr. Roach (See original lease, defendant's Exhibit "K"). That lease is the lease in dispute in this lawsuit.

On the same day, February 27, 1941, Mr. Roach presented a copy of the new lease to the Probate Court for its approval and the lease as signed was on that day specifically approved by the Court (defendant's Exhibit "M").

Defendant took bids for the demolishing of the building on the property preparatory to constructing the new building. Three bids were received—one to demolish the old building for the material in it, one for about $30 to $35, and one for about $156 (R 369). The latter bid was made by Mr. Swoboda, also listed in the records as "Sabotta." His bid was high and he did the work. He testified at the trial (R 222, 401). Part of the old building on the property was moved to the rear of the lot and the walls were laminated to meet city requirements, and it was used

as a boiler room for the new building and for storage. It was constructed or altered at the same time as the new building (R 373). This building is shown on the assessor's plat as Building 2, appraised at $2,272 (defendant's Exhibit "U"). It is apparently the building called "another, second, and additional building" in plaintiff's complaint. It was further improved by turning it into a cold storage room in 1947 and 1948, as will be set out in the next paragraph.

Under the terms of the second lease above described, defendant, prior to the month of June, 1942, expended something over $30,000 in constructing a new building on the premises. In 1945 defendant added a cinder block boiler room to the main building at a cost of some $2,300. Between April, 1947, and January, 1948, defendant expended nearly $6,000 in converting part of the former boiler room into a cold storage room. Total investment of defendant in buildings on the property stood at $38,621.08 at the time of trial (R 461, defendant's Exhibit "X").

Mr. Campbell continued to act as guardian of the estate of Arno Liebscher until August 25th of 1941. On that date he filed his final account with the Court, and at his own request was discharged as guardian as of that date. L. D. Roach, the plaintiff in this action has been an attorney at law, duly admitted to practice in Alaska, and has been practicing his profession at Anchorage since 1924 (R 286) and acted as attorney for such guardian in preparation and presentation of his final account, and of the order approving such account and discharging the guardian (See defendant's Exhibits "N" and "O", R 298, 328, 329).

At the same time Mr. Campbell filed his final account, Mr. Roach, the appellant, was appointed guardian in his stead (defendant's Exhibit "P", R 298, 328, 329) and took office right away (R 298) and has acted as guardian of Mr. Liebscher since August 25, 1941 (R 298).

All rentals under the terms of the lease were from the beginning paid by check sent through the mail by defendant (R 271). From the beginning, first to Mr. Campbell and later to Mr. Roach, some of the rental payments were made late. Some of them were made early. Defendant's Exhibit "V" lists various checks paid by defendant and accepted by the guardian after the tenth of the month. These checks include the checks made February 17, 1941, October 13, 1941, October 13, 1942, December 11, 1942, December 11, 1944, and September 11, 1945. Defendant's Exhibit "S" lists all checks from December, 1945, to and including the ones for December, 1948, and January, 1949. The latter two checks were not accepted by the guardian. The exhibit shows the number of the check, the date of the check, the month for which it was paid, and the date it was banked. The check for December of 1945 was dated December 28, 1945, the check for January of 1947 was dated January 14, 1947, and the check for December of 1948 was dated December 27, 1948. All the checks from December, 1945, through June of 1947 were held and banked together on June 18, 1947. Checks since that time generally were banked every two months, two together, but the checks for February, March, April, and May of 1948 were held until

June 13, 1948, and banked with the June check on that date. Checks for August, September, October, and November of 1948 were banked together on November 24, 1948.

Rental payment for December, 1948, was offered by check drawn by defendant dated December 27, 1948. The check was refused and was returned by plaintiff, together with another check dated January 3, 1949, tendered for the January rent (defendant's Exhibit "D").

Rent for December, 1948, and for January, 1949, together with rent for subsequent months, and together with $174 as an estimated sum to cover interest, costs, and attorney's fees were paid into court as a tender, beginning with a check in the sum of $309 dated February 1, 1949. To the date of the trial, such tender amounted to $714 (defendant's Exhibit "E", defendant's answer Par. IX, R 26).

Plaintiff paid all taxes levied against the leased property until 1948 but failed to pay taxes for 1948 or 1949. Defendant paid all 1948 taxes (R 211) on April 4, 1949, to prevent sale of the property. This payment amounted to $965.73, including penalty, interest, and costs (see plaintiff's Exhibit 1 and defendant's Exhibits "A" and "B"). Taxes for 1949 had not been paid by anyone to the date of the trial (R 211), and including penalty, interest, and costs, amounted to $943.60 to the date of the trial (see plaintiff's Exhibit 1).

In the fall of 1946, for the tax year 1947, the assessor's office for the City of Anchorage for the first

time separated value of the land itself from the value of the buildings. This procedure was general throughout the city (R 185). As it affected the property here in question, that procedure valued the land as distinguished from the buildings at the sum of $18,000 and valued the buildings on a cubic foot basis. As a result of that valuation, the value of the two buildings was set at $16,230 as of the date of the assessment. The sum of $1116 was allowed for depreciation, leaving a net value of the two buildings for the year 1946 in the sum of $15,114. In figuring the tax for that year, levy was made on ninety per cent of the value above set forth, plus ninety per cent of the land, or a total of $29,803. The tax was figured on $29,803 at 15 mills, making a total tax of $447.05 (R 169-171, 185, 186, defendant's Exhibit "U", plaintiff's Exhibit 1). For the year 1948 the same basic method was used in computing the assessment except that the council, by resolution that year, raised the assessed valuation of all buildings in the city by 25 per cent over the base value for the year 1947, leaving the value of the land the same as for the previous year. Insofar as the property here in question is concerned, this procedure raised the assessed value of the buildings to $18,892, and taking it at the nearest $25, resulted in an assessment on the buildings alone of $18,900, or with the lot made a total assessed valuation of $36,900. The tax was figured at 20 mills, making a total tax of $738. The same procedure was used for the assessment for the year 1949 (R 187, defendant's exhibit "U", plaintiff's Exhibit 1).

Under date of June 3, 1942, the Probate Court at Anchorage, in approving the first account of the plaintiff, Mr. Roach, as guardian, among other things ordered that the guardian pay to his ward for his personal use the sum of $5.00 per month and such further small amounts at Christmas and holidays as he might desire (plaintiff's Exhibit 2).

Under date of July 8, 1946, the Secretary of the Interior of the United States of America, under the provisions of a law approved October 14, 1942, made an administrative finding to the effect that L. D. Roach, as guardian, was able to pay toward the support and maintenance of Arno Liebscher for the years prior to that date a sum amounting to $600, and that for the care and treatment of Arno Liebscher, commencing with June 1, 1946, the guardian was able to and should pay to the United States of America the sum of $25 per month (plaintiff's Exhibit 11). Plaintiff paid the sum of $900 under the terms of such order (Eighth account of guardian, defendant's Exhibit "R") and that paid the account through the month of May, 1947. Nothing has been paid by the guardian on that account since the one payment of $900, and the sum of $25 per month is owed to the Government since June 1, 1947 (R 318, 319).

The guardian, J. R. Campbell, in the year 1941 executed and delivered two warranty deeds. One of such deeds conveyed certain real property in the Anchorage Recording Precinct to the United States of America. The deed is dated May 15, 1941, and the signature of the grantor is witnessed by L. D. Roach, the

plaintiff in this action, and another party, and is acknowledged by L. D. Roach. Consideration on that deed is stated to be $5,000 and the deed is recorded in Book 18 of the Precinct Records, Anchorage Recording Precinct, at page 207 thereof (R 330, defendant's Exhibit "W").

The second of such deeds was executed by James R. Campbell and Anna Campbell as grantors to one Florence Hoffman and is dated August 28, 1941. The signatures on that deed also are witnessed by L. D. Roach and another party and the acknowledgment was made before L. D. Roach. That deed conveys certain property in the City of Anchorage, Alaska, and is recorded in Book 34 of the city records of the Anchorage Recording Precinct at page 99 thereof (defendant's Exhibit "W").

Under date of July 12, 1943, James R. Campbell, as grantor, conveyed certain property situated in the City of Anchorage, Alaska, to Anna K. Campbell, the grantee. This deed was executed in the State of California and acknowledged before a Notary Public for the State of California and is recorded in Book 38 of the city records of Anchorage Recording Precinct at page 316 thereof (R 331, 332, defendant's Exhibit "W").

Plaintiff introduced certain evidence through a witness by the name of Backman concerning the value of the property at the time of the trial, and this witness testified that the replacement value of the building constructed by defendant, as distinguished from the land, at that time was about $60,000, and that the

lot, as distinguished from the buildings, at that time was worth about $20,000 (R 233, 234). The same witness testified that 15 per cent of the valuation was a common rental basis in the City of Anchorage (R. 232).

Appellant since the year 1945 has periodically been claiming that the money coming in from the lease was not sufficient to meet the obligations of the estate, and so far as the record shows, late in 1946 first claimed that Mr. Campbell, the former guardian, was incompetent at the time of making the lease. Thereafter, negotiations were had between the parties and certain correspondence passed between the parties concerning the possibility of the defendant securing a new lease for a longer term in exchange for paying the taxes, and concerning the possibility of the defendant buying the property. The various letters are in evidence as plaintiff's Exhibits 3 and 4, and the five letters which constitute defendant's Exhibit "T". This correspondence will show the thinking of the parties at the time the controversy arose and in attempting to work out the controversy. Also, defendant's Exhibits "A" and "B" respectively have to do with the payment of the taxes by the defendant for the year 1948 on April 4, 1949, for the purpose of protecting its interest in the property.

This action was tried November 28, 29, 30, and December 1, 1949.

Written opinion of the court was filed December 30, 1949, and is found beginning at page 64 of the transcript.

By such opinion, the court in general rejected the various claims made by appellant, but found that proper interpretation of the subject lease would be that the building constructed by appellee belonged to appellee until the end of the leasehold term and would require appellee to pay the taxes attributable to the buildings constructed by it, while appellant should pay taxes levied against the land as distinguished from the buildings, and that appellee should repay to appellant taxes previously paid by appellant as to the buildings, and that appellee should receive credit for taxes levied on the land, as distinguished from the buildings, for the year 1948 paid by appellee. The opinion also found that appellant should be entitled to costs.

Since no evidence had been offered as to any breakdown between value of buildings as distinguished from land in tax assessments for the years 1941 through 1946, the court, by its opinion, left that question open (R 81). Subsequent to January 12, 1950, appellant filed his Exhibit 15, being a breakdown of valuations and taxes for such years, made on January 12, 1950, by Merrill G. Chitty, City Tax Assessor. Such breakdown was adopted by the court in its Finding of Fact number XVIII (R 104) and in Paragraph (1) of its decree (R 112).

Appellant prepared proposed findings of fact and conclusions of law and decree for the court's signature. These documents generally, but not entirely, followed the court's opinion. The court did not sign such proposed findings, conclusions, and decree, and

appellant took a general exception to such refusal (R 91, 93).

Appellee prepared proposed findings of fact, conclusions of law, and decree, and the same were signed by the court on March 3, 1950. The findings begin at page 94 of the record, the conclusions of law at page 105 of the record, and the decree at page 111 thereof.

The court on March 3, 1950, allowed both parties one week to submit exceptions to the findings of fact and conclusions of law and decree as signed (R 82).

Appellant took no exceptions to the findings of fact, conclusions of law, or decree as signed, or to any part or parts thereof.

Appellee took various exceptions to the findings of fact and conclusions of law and decree as signed (R 116).

IV.

ARGUMENT.

Appellant in this cause has filed no specification of errors. He is prosecuting the appeal on the basis of his statement of points found beginning at page 127 of the record.

These statements are 21 in number. The first 5 are general in nature and in brief claim that the court erred in failing to sign the findings of fact, conclusions of law and decree proposed by the defendant on the ground that such findings of fact, conclusions of

law, and decree "are not supported by sufficient evidence and are contrary to the evidence and in some instances are not supported by any evidence, and that the court erred in applying the law as set forth in its opinion." So far as these particular statements are concerned, no error is alleged as to any particular findings of fact, conclusions of law, or any particular portion of the decree. Neither is any particular portion of the court's opinion attacked as not being in accordance with the law.

Plaintiff in his brief has consolidated Statement of Points Nos. 1 to 5 inclusive for argument.

Statement of Points Nos. 6, 7, and 8 are to the effect that the court erred as follows:

(6) In not holding the lease in question to be unenforceable and void.

(7) In its construction of jurisdiction of the Probate Court in Alaska.

(8) In construing the powers of a guardian of an insane person.

These three points are consolidated for argument in plaintiff's brief.

Statement of Point No. 9 alleges that the court erred in not holding that the property of the ward was *in custodia legis.*

Statement of Point No. 10 is to the effect that the court erred in not holding the contract in question to be unconscionable.

Statement of Point No. 11 is to the effect that the Court erred in not holding that the guardian was an

incompetent person at the time of making the contract.

Statement of Point No. 12 is to the effect that the court erred in not holding that the lessee was bound by the rule of *caveat emptor*.

Statement of Points Nos. 13 and 14 are to the effect that the court erred in admitting and in excluding evidence. These points are not argued at all by the plaintiff in his brief and will not be argued by the defendant. For the purpose of this argument appellee will consider that the statement of points are the specification of errors as required by Rule 20, Court of Appeals, Ninth Circuit, Subsections (d) and (e). Points not argued in the brief are presumed to be abandoned.

McCarthy et al. v. Ruddock (C.C.A. 9), 43 F. (2d) 976;

Forno v. Coyle (C.C.A. 9), 75 F. (2d) 682.

Statement of Point No. 15 alleges that the court erred in not holding the lease forfeited by reason of nonpayment of rent.

Statement of Points Nos. 16, 17, and 21 allege in brief as follows:

(16) The court erred in not holding that the lease was made for a longer period of time than the guardian had the power to make.

(17) That the court erred in not holding that the guardian had no authority to bind the ward's property by the lease in question.

(21) That the court erred in not cancelling the lease and restoring the plaintiff to the property.

Points Nos. 16, 17, and 21 are argued together in plaintiff's brief.

Statement of Points Nos. 18, 19, and 20 are argued together in plaintiff's brief and state in brief that the court erred as follows:

(18) In not holding that the rental and benefits received by the plaintiff, being far in excess of the amount paid, constitute an equity on the part of the plaintiff, and that the inequitable position taken by the defendant was sufficient to cancel the lease.

(19) In not differentiating between a guardian appointed by a Probate Court in Alaska and a trustee.

(20) That the findings of fact, conclusions of law, and decree, as signed by the court fail to grant sufficient relief to the plaintiff.

Under the practice of the District Court for the Territory of Alaska it is common for the successful party in an equity case to prepare proposed findings of fact, conclusions of law, and decree for consideration by the Court. If the unsuccessful party is not satisfied with the findings of fact, conclusions of law, and decree proposed by the successful party, he may propose findings and conclusions and decree on his own behalf and then the ultimate responsibility of the Court is to adopt one set of findings, conclusions, and decree or the other, or to modify the proposed findings, conclusions, and decree to his satisfaction, or to completely rewrite such findings of fact, conclusions of law, and

decree. That practice was followed in this matter and the Court signed the findings of fact, conclusions of law, and decree proposed by the appellee and refused to sign the findings of fact, conclusions of law, and decree proposed by the appellant.

> "Proposed Findings of Fact and Conclusions of Law submitted by counsel are no more than informal suggestions for the assistance of the court, and only those findings made by the court form part of the record on appeal."
>
> "The fact that proposed Findings of Fact adopted by the trial judge have been prepared by the successful counsel does not detract from their legal force. They are entitled to the same respect as if the judge drafted them."
>
> "The general rule is that a Court of Appeals will consider only those Findings of Fact and Conclusions of Law which are signed by the trial judge and filed as part of the record on appeal."
>
> "Thus proposed Findings or counter-findings of either of the parties may not be included properly in the record on appeal. This has been said to differ somewhat from the former practice."
>
> *Barron and Holtzoff, Federal Practice and Procedure,* 1950, Sections 1124 and 1130, Pages 818 and 830, respectively, both commenting upon Rule 52 of the Federal Rules of Civil Procedure.

American Elastics v. U. S. (D.C. N.Y.) 1949, 84 F. Supp. 198;

Simons v. Davidson Brick Co. (C.C.A. 9), 1939, 106 F. (2d) 518;

U. S. v. Forness (C.C.A. 2), 1942, 125 F. (2d) 928 (certiorari denied 62 S. Ct. 1293, 316 U.S. 694, 86 L. Ed. 1764).

Accordingly, appellee believes that the findings of fact, conclusions of law, and decree proposed by appellant and not signed by the Court are not properly part of the record on appeal and are not before the Court and they will not be discussed by appellee.

Under Rule 52 of the Federal Rules of Civil Procedure as amended, the Court, if it desires to do so, may incorporate its findings of fact and conclusions of law in an opinion or memorandum of decision (see Rule 52, Federal Rules of Civil Procedure, Subsection (a)).

> "The amendment does not prohibit the writing of a separate opinion in addition to formal Findings of Fact and Conclusions of Law, if the trial court deems it necessary to do so * * * The trial judge speaks through his findings and judgment. Statements in an opinion which is not regarded or intended as embracing Findings of Fact or Conclusions of Law cannot control, modify, or impeach the findings or decision."
>
> *Barron and Holtzoff, Federal Practice and Procedure,* above cited, Section 1128, p. 827.

General Metals Powder Co. v. S. K. Wellman Co. (C.C.A. 6), 1946, 157 F. (2d) 505.

The opinion of the Court in this case does not purport to include findings of fact and conclusions of law, and accordingly appellee believes that the opinion of the Court is not properly before the Court on

review, and that appellant should not be entitled to object to matters in the opinion except insofar as such matters are included in the findings of fact and conclusions of law as signed.

Findings of fact made by the trial Court will not be set aside on appeal unless clearly erroneous, and in considering such finding due regard will be given by the Appellate Court to the opportunity of the trial Court to judge the credibility of the witnesses.

Federal Rules of Civil Procedure, Rule 52, Subsection (a) as amended.

The unsuccessful party on appeal may raise the question of the sufficiency of the evidence to support the findings "whether or not the party raising the question has made in the District Court an objection to such finding, or has made a motion directed to them, or has made a motion for judgment.

Federal Rules of Civil Procedure, Rule 52, Subsection (b).

"Upon motion of a party made not later than ten (10) days after entry of judgment, the court may amend its Findings *or make additional Findings* and may amend the judgment accordingly." (Emphasis supplied.)

Federal Rules of Civil Procedure, Rule 52, Subsection (b).

"The motion or its equivalent cannot be made in the Appellate Court by a party who failed to make it in the Trial Court."

Barron and Holtzoff, Federal Practice and Procedure, above cited, Section 1129, p. 829.

Kennedy v. U.S. (C.C.A. 9), 1940, 115 F. (2d) 624.

As appears from the record appellant made no motion to the District Court to amend its Findings or to make additional findings. Neither did appellant take any exceptions to any of the findings as made.

We believe that on the record as presented, appellant in this case is limited to the sufficiency of the evidence to support the findings as made by the Court and to the application of the law made by the trial Court from the findings as made, and believe that on the state of the record appellant should not be entitled to claim that other or further findings should have been made by the Trial Court.

Appellant's statement of points Nos. 1 and 2 respectively relate to the alleged insufficiency of the evidence to sustain the findings of fact, conclusions of law, and decree of the trial Court. In his argument, appellant cites considerable law to the effect that under the Federal Rules of Civil Procedure in a case tried to the Court without a jury, the Appellate Court has the right to consider all the evidence to determine as to whether there is sufficient evidence to support the findings of fact and conclusions of law and states that under such rules, particularly Rule 52, that the practice is similar to the practice under the equity rules. That, of course, is true. However, since this is an equity case, it would seem that it was not necessary to cite authorities to that effect. That has apparently been the practice previous to the adoption of the Federal Rules of Civil Procedure insofar as equity cases were concerned.

Appellant then goes ahead in his brief and attempts to show that there was not sufficient evidence to support the findings made by the trial Court. He states that in this case there is little dispute in the facts except as to the condition of Mr. Campbell, the former guardian, and that statement is probably literally true, but the condition of Mr. Campbell is the central point of appellant's alleged equity and there is considerable dispute on that point, and the findings of the Court on such disputed question should not be disturbed by the Appellate Court.

> "On appeal, the appellate court does not retry the case. The findings of fact are presumptively correct and will not be set aside unless clearly against the weight of the evidence or based upon an erroneous view of the law. Consequently, an appellant seeking to overthrow the findings has the burden of presenting a proper record to the Court of Appeals showing that the evidence compelled a finding in his favor."
>
> *Barron and Holtzoff, Federal Practice and Procedure,* cited above, Section 1131, page 831.
>
> *Paramount Pest Control Service v. Brewer* (C.C.A. 9), 177 F. (2d) 564;
>
> *U. S. v. Foster* (C.C.A. 9), 123 F. (2d) 32;
>
> *Ruud v. American Packing & Provisions Co.* (C.C.A. 9), 177 F. (2d) 538;
>
> *Peterson v. Denevan* (C.C.A. 8), 177 F. (2d) 411.

> "Findings of fact are not 'clearly erroneous' unless unsupported by substantial evidence or clearly against the weight of the evidence or induced by an erroneous view of the law. The mere fact that

on the same evidence the appellate court might have reached a different result does not justify it in setting the findings aside. The appellate court does not consider and weigh the evidence de novo.

"In considering whether trial court's findings are clearly erroneous, appellees must be given the benefit of all favorable inferences which reasonably may be drawn from the evidence."

Barron and Holtzoff, Federal Practice and Procedure, above cited, Sec. 1133, pages 834, 835.

"At a trial without a jury the judge determines the credibility of oral testimony of the witnesses and the weight to be given to it. An appellate court will not set aside findings of the trial court based upon such evidence."

Barron and Holtzoff, Federal Practice and Procedure, above cited, Sec. 1134, page 845.

Gates v. General Casualty Co., (C.C.A. 9), 120 F. (2d) 925.

"If, however, the findings of fact are supported by substantial evidence and not against the clear weight of the evidence the appellate court may not overturn them."

Barron and Holtzoff, Federal Practice and Procedure, above cited, Sec. 1135, page 850.

Omaha Hardwood Lumber Co. v. J. H. Phipps Lumber Co. (C.C.A. 8), 135 F. (2d) 3.

Appellant in his brief claims in arguing his statement of points numbered 1 to 5 that the evidence will

not sustain the findings of fact and conclusions of law in the following respects:

1. That Campbell, the former guardian was incompetent when he executed the lease which is the subject of this action (brief page 48a).

2. That Campbell was over-reached and over-persuaded until he agreed to and did execute such lease which appellant calls "this monstrosity of a lease, which has now become oppressive, unfair, inequitable, and confiscatorial" (brief pages 48a and 49).

3. That the incompetent is helpless and hopeless and plaintiff cannot pay taxes and pay toward the keep of his ward.

4. That nonpayment of rent on time was a means to an end to force a tax sale of the property so that defendant could buy the property far below its value (brief 49, 56).

5. That taxes will confiscate the property if plaintiff is not relieved from "this unconscionable lease."

Appellee will consider these propositions in order.

In support of his first proposition, appellant claims that the undisputed evidence of the nurse (Simonson), Roach, Carlson, and McElligott was that:

(a) Campbell didn't want to be annoyed. So far as the writer can determine, McElligott didn't testify on that point at all. The others did so testify.

(b) That when Campbell sold his house he "*gave away* thousands of dollars worth of paintings, dishes, and personal effects because he didn't want people running in to pack them."

The writer of this brief believes that no one testified on that point except the witness Simonson and that her testimony doesn't support the contention that Campbell gave anything away, not to mention "thousands of dollars of property." The testimony is that Mrs. Campbell was upset because she wanted to take her things and Mr. Campbell refused, but that the things were sold with the house (R 415). "It went as part of the house when it was sold" (R 427).

It seems to appellant that neither of these propositions tend to prove that Mr. Campbell was incompetent. In the first place, many people don't want to be annoyed. That is not a sign of incompetency. In the second place, there is no evidence at all that the price for the house didn't include a fair price for the paintings and dishes and other personal effects. Mrs. Simonson testified that she knew nothing of the business affairs of the Campbell's except that they sold the home (R 431).

Appellant called five witnesses concerning Campbell's mental condition. Dr. Heitmeyer and Mr. McElligott testified by deposition. Mr. Carlson, Mrs. Simonson, and Judge Roach testified at the trial. It is interesting to note that none of these witnesses were present at the time the lease was being negotiated and signed except Mr. Roach. It is even more interesting to note that Mr. Roach offered no testimony as to Mr. Campbell's condition at the time the lease was signed, and none as to such condition about that time except his statement that Campbell said, "Give them anything they want and get them off my neck." That

statement, of course, doesn't compel a finding of incompetency, especially in view of the fact that according to the undisputed evidence the parties had discussed the terms of the lease and come to an agreement as to such terms between themselves and with the probate judge, and that the witness himself had discussed the matter with the probate judge and had secured an order from such judge to lease the property (R 496, defendant's Exhibit "J"). If, in fact, Campbell did use that language it seems entirely logical that he meant that the matter, including taxes, had been fully discussed and agreed upon between the parties and approved by the Court and that he wanted to get the lease signed.

We believe Mr. Roach's actions at the time the leases were signed speak louder than his words at the trial. He drew the two leases and all of the petitions and orders for the Court at Campbell's direction. He presented the matters to the Court. He was present when the leases were signed and he witnessed and acknowledged Campbell's signature to such documents. He made no protest when Campbell signed. Even now he hasn't testified that he believed Campbell was incompetent to sign the leases. At a later date he witnessed and acknowledged two deeds executed by Campbell. It seems clear that, whatever he may believe now, at the time the leases were executed he knew Campbell was competent.

As against plaintiff's evidence as to Campbell's mental condition, two witnesses, who were present when the lease was signed, testified that Campbell

knew exactly what he was doing, read and understood the lease, and understood its terms.

We believe that under the evidence and under the law the findings and conclusions of the trial Court as to Campbell's competency are adequately supported by the evidence.

In support of his second proposition, appellant alleges that Campbell was over-reached and over-persuaded by defendant's agents. There is not a shred of evidence to support that contention. Campbell at all times had the advice of counsel and consulted about the matter with the probate judge. There is no allegation of fraud or of confidential relationship. Appellee believes that the Court was amply justified in its conclusion to the effect that Campbell was not improperly influenced or over-reached by defendant.

In support of his third proposition, appellant claims that the ward is helpless and hopeless and that under the terms of the lease he cannot pay the taxes and support his ward. We believe the trial Court "leaned over backwards" to favor the ward in requiring appellant to pay taxes attributable to the building. Be that as it may, we have taken no appeal from the order. It seems to us that appellant has fixed in his mind so strongly that he wants to void the lease that he hasn't tried to work the matter out. There is available to appellant under Court decree something over three hundred dollars from taxes found to be owed by appellee from 1941 through 1947, after deducting the money appellee paid for appellant on taxes against

the land for 1948. There also was available at the time of the decree the sum of $720 as rent. The latter figure increases at $45 per month. To the present date that sum would be $1170. Thus, at the present time appellant has available about $1500 plus his costs and attorney's fee. This sum would be sufficient to pay appellant's share of the taxes from 1949 through 1952 on the basis of taxes charged for the years 1948, 1949, and 1950, and leave money over. The lease in any event terminates in February of 1956. Rents from February, 1951, through January, 1956, will amount to $2700.

Appellant should have no difficulty paying his share of the taxes through the leasehold term under order made by the District Court. If appellant needs money to support his ward, he can sell the property under statute or take such other steps as may be available. It seems inequitable on the face of it that appellant should ignore the powers given by law to protect the estate of his ward and attempt to gain an advantage of defendant by cancelling its lease after it has furnished the building which was made part of the consideration for the lease.

In answer to plaintiff's fourth contention, we submit that there is no evidence anywhere that defendant was trying to force a sale of the property at tax sale or otherwise. All of the correspondence together shows that defendant would be willing to increase the rent or to pay taxes if a longer lease could be arranged, or would be willing to buy the property if appellant would sell. Appellant flatly refused both

offers and brought this action. When the property came up for tax sale appellee paid all those taxes.

We submit that appellant has completely failed to show that the evidence failed to support the findings, the conclusions, or the decree.

In answering appellant's points Nos. 6, 7, and 8, appellee believes that no substantial error is there alleged. It is admitted that there is no evidence that the December, 1948, and January, 1949, checks were refused as not being lawful tender. Neither is there any evidence to the contrary. The point, which apparently appellant missed, is that by a course of dealing in accepting rent after the due date appellant waived strict performance of the lease in that respect.

As has previously been shown, the Court decree, as given, will allow appellant to save the property from tax sale if he cares to do so. It is apparent that the trial Court never meant to imply that the Probate Court was a Court of equity. We will later discuss the power of the guardian to lease and of the Court to approve leases.

We have already discussed the contention that Campbell was incompetent and that he was overreached or over-persuaded.

As we have already shown, the lease in question was not confiscatorial, at least not as interpreted by the trial Court. We marvel at the agility of appellant in continually claiming that the lease was confiscatorial, inequitable, and unconscionable. The undisputed evidence is that Campbell received less than $15 per

month for the place over a period of more than ten years. He was receiving only $10 per month immediately prior to the lease to appellee. The old buildings on the property were of slight if any value. Defendant obligated itself by the lease to pay $45 per month rental, four and one-half times the rent then charged, and in addition to build a building to cost at least $15,000 which would revert to the estate. Appellee actually spent nearly $40,000, and the buildings constructed by appellee, taken by themselves, could probably not have been replaced at the time of the trial for $60,000, according to the testimony of appellant's witness, Backman. According to undisputed testimony, that type building completely depreciates in from fifty to sixty years. The building had been standing nine years at the time of trial but was worth $60,000 then. Assuming its life at forty-nine years, for convenience in figuring, it had a remaining life of forty years at the trial date and would depreciate at the rate of $1500 per year or would be worth $51,000 at the end of the lease. That would amount to $3,400 in additional rent each year over the fifteen-year lease, or including the cash rent, would amount to almost $4,000 per year. We would say that is pretty fair ground rent for a vacant lot worth $1,500 at the time the lease was made and worth possibly $20,000 at the time of trial. Appellant's contention that the rent paid by appellee is nominal is not supported by any evidence at all.

Appellant's Statement of Point No. 9 alleges error in not finding that the property is *in custodia legis*. Ap-

pellee has no quarrel with that statement as a general proposition, but contends it is immaterial here. The Court more than did equity for appellant in requiring appellee to pay taxes on the building, as previously mentioned. There is no evidence in the record which would justify an equity Court in going any farther in favor of the ward than the trial Court went.

In answer to appellant's argument as to his Point No. 10, we have this to say:

We have already shown that the lease was extremely favorable to the ward, both at the time it was made and since that time. The lease under the evidence was not unconscionable. Granted that the Court may relieve a party from a hard bargain in a proper case, this is not such a case.

There is not a shred of evidence that the text of the lease in question is the work of appellee, as claimed by appellant. The record shows that the lease was drawn solely by appellant, as attorney for Campbell. Appellee did furnish a draft of the first lease, but a comparison of such draft with both leases will show that the draft was only a starting place as to the first lease and not used at all as to the second.

While the cash rental is less than taxes presently charged against land and buildings, as has been shown, there was never any attempt made by defendant to force a tax sale. Under the decree entered by the trial Court, cash rent should easily pay the taxes on the land for the balance of the lease.

There is no evidence to support appellant's claim that reasonable rent for the property exceeds all investment, and it would be immaterial even if it were shown. Appellant has shown no equity which would justify cancelling the lease and has failed to show that the lease was anything except an excellent bargain for the ward. The entire estate of the ward in 1941 was valued at $1,500. The same estate nine years later, at the time of trial, was worth $80,000. Sixteen thousand eight hundred dollars ($16,800) of the increase was represented by increase in the value of the land. Appellee claims no credit for that except as its building enhanced the value of the land itself, but the balance of such increase is represented by the building appellee built.

Appellant ever since this suit was commenced has claimed that appellee under the lease was entitled to build only one building and thus by building another building enhanced the taxes. Appellee has contended there was no limit in the lease on its right to build as long as it expended at least $15,000, and that anyway it had constructed only one new building. However, in view of the ruling of the trial Court, that point became moot. The more buildings appellee builds, the more taxes it must pay and the more the appellant will have at the end of the term. Appellant should not object to that.

Contrary to appellant's contention, it would be highly inequitable under all the circumstances to cancel the lease.

Appellee has previously answered appellant's argument as to his Point No. 11.

In answer to appellant's argument on his Point No. 12, appellee finds nothing in that point which would justify a reversal or alteration of the decree made by the lower Court. Admitting that the Probate Court is an inferior Court, it seems that appellant, in order to invoke the doctrine of *caveat emptor,* would have to show that the action of the Probate Court was void. He has not done so. We will further discuss this point under our answer to appellant's Point No. 16.

In support of his Point No. 15, appellant speaks about "the many, many failures of defendant to pay rent." Actually, as the record shows, all payments of rent were made. Over a period of eight years, ten rental payments were made late. Three of these were one day late, three were three days late, one was seven days late, one was fifteen days late, one was seventeen days late, and one eighteen days late. During that same period at least thirty payments were made early. All late payments were accepted by the appellant except the last one. As to that payment, appellant sought in this action to void the lease.

It is admitted that rental payment for the month of December, 1948, was made late. It was sent on December 28, and defendant mailed the January, 1949, rent under date of January 3, 1949. Both checks were refused and returned by appellant's attorney. Appellee then paid the rent, with interest and costs, into Court, and performed the other covenants or agree-

ments on the part of the lessee according to Alaskan law.

> "When in case of a lease of real property and the failure of tenant to pay rent, the landlord has a subsisting right to reenter for such a failure, and may bring action to recover the possession of such property, and such action is equivalent to a demand of the rent and a reentry upon the property. But if at any time before judgment in such action the lessee or his successor in interest as to the whole or a part of the property pay to the plaintiff or bring into court the amount of rent then in arrear, with interest, and the costs of the action, and perform the other covenants or agreements on the part of the lessee, he shall be entitled to continue in the possession according to the terms of the lease."
>
> A.C.L.A. 1949, 56-1-13, page 1927.

Defendant was entitled to continue in possession according to the terms of the lease.

In addition to the statutory provision, the trial Court as a Court of equity, denied the forfeiture claimed by appellant.

> "Equitable relief against forfeiture of a lease is generally granted in all cases of nonpayment of rent if such payment is delinquently made or tendered, unless there is some ground for denying such relief."
>
> 32 *Am. Jur., Landlord & Tenant,* Sec. 891, page 755.

See also,

> *Moran v. Lavell,* 32 R.I. 338, 79 At. 818 on necessity of demand.

Both by reason of statute and by Court action, appellant is denied a forfeiture of the lease based on the late rent payment.

Appellant has argued his statements 16, 17, and 21 together. In short, appellant argued under these points that the subject lease was beyond the authority of the guardian to make or of the Probate Court to approve, that there is no statute authorizing a lease for such a long term and that accordingly the lease is void and that the trial Court erred in not so holding.

At the outset appellee will concede that no statute of Alaska specifically authorizes a guardian to lease the ward's property for a term of fifteen years. In fact there is no statute specifically authorizing a lease of such property for any number of years. Neither is there any statute of Alaska denying to a guardian the right to lease property of his ward for fifteen years or for any other time.

At common law a guardian had inherent power to lease his ward's land without any order or authority from the Court at all. Such leases, made without authority of the Court, were held to be voidable at the election of the ward on the termination of the guardianship. On the other hand, at common law and under Statutes declaratory thereof, a lease by a guardian with Court approval was binding for its full term even in case of prior termination of the guardianship.

> "In the absence of any statutory provision on the subject, it seems that a guardian may lease his ward's real property without obtaining an order of court therefor, though such lease is perhaps more properly made under the supervision

of the court, to the end that a fair rental may be obtained and provisions embraced in the lease for the protection of the ward's interests."

Bancroft's Probate Practice, Sec. 1340, p. 2165.

"Under the common law and statutes declaratory thereof, a guardian has power to lease the lands of his ward without authorization by the probate court."

Bancroft's Probate Practice, Sec. 1341, p. 2167.

"As a rule a lease may be made upon such terms and conditions, and for such length of time, as the court, in the exercise of a sound discretion, may direct or approve as being for the best interests of the ward under the circumstances; the court is authorized, on the application of the guardian, to make such orders and give such directions as are needful and as the circumstances may require."

"Under the law, or statutes simply declaratory thereof, leases made by the guardians to extend beyond the term of the guardianship are voidable; but a lease of a minor's land pursuant to an order of the probate court is valid at common law though it extends beyond minority."

Bancroft's Probate Practice, Sec. 1344, p. 2172.

"It generally has been held in the United States, in the absence of a statute requiring an application to be made for leave to lease, that the power is vested in a general guardian to lease the real estate of his ward on fair and reasonable terms, without seeking the consent or approval of the court."

25 *Am. Jur.,* Sec. 112, p. 72.

"While there is a conflict of authority on the point, the majority of the cases take the view that a court having jurisdiction over estates of infants and incompetents, unless prohibited from so doing by the statute, may, in the exercise of its inherent or statutory power to sell or mortgage land of an infant, properly exercise the lesser power of approving a lease of such land extending beyond the infant ward's minority, if, thereby, his interests are materially promoted, and that such leases made by guardians with the express approval of the court are valid and binding upon the ward after he reaches full age."

25 *Am. Jur.*, Sec. 115, p. 73.

Pertinent Alaskan statutes on this point are as follows:

"The judicial power in the territory of Alaska is vested in a district court, in commissioners exercising the powers of probate courts, and in commissioners as ex-officio justices of the peace."

A.C.L.A. 1949, 52-1-1, p. 1642.

"The respective judges of the court shall appoint, and at pleasure remove, clerks and commissioners in and for the Territory, who shall have the jurisdiction conferred by law in any part thereof."

A.C.L.A. 1949, 54-4-1, p. 1663.

"The commissioners shall be ex officio justices of the peace, recorders, and probate judges."

A.C.L.A. 1949, 54-4-3, p. 1664.

"The commissioners appointed in pursuance of this act and other laws of the United States have

jurisdiction within their respective precincts, subject to the supervision of the district judge, in all testamentary and probate matters; that is—

"* * * Seventh. To take the care and custody of the person and estate of a lunatic or habitual drunkard and to appoint and remove guardians therefor; to direct and control the conduct of such guardians and to settle their accounts."

A.C.L.A. 1949, 61-1-1, p. 2100.

"In the exercise of the jurisdiction conferred upon commissioners by this code in the administration of the estates of deceased persons, and of minors, lunatics, and habitual drunkards, such commissioners shall sit as a probate court, which shall be always open for the transaction of business."

A.C.L.A. 1949, 61-1-2, p. 2102.

"The mode of proceeding is in the nature of a suit in equity as distinguished from an action at law. The proceedings are in writing, and are had upon the application of a party or the order of the court."

A.C.L.A. 1949, 61-1-5, p. 2102.

"Commissioners in their respective precincts shall have power to appoint guardians to take care, custody, *and management of the estate, real and personal, of all insane persons,* idiots, and all who are incapable of conducting their own affairs, and the maintenance of their families and the education of their children." (Emphasis supplied.)

A.C.L.A. 1949, 62-1-11, p. 2174.

"Every guardian so appointed for an insane person shall have the care and custody of the person of the ward *and the management of all his estate* * * *" (Emphasis supplied.)

A.C.L.A. 1949, 62-1-13, p. 2175.

"The guardian shall *also manage the estate* of his ward frugally and without waste, and *apply the income and profits thereof,* so far as may be necessary, for the comfortable and suitable maintenance and support of the ward and his family, if there be any; and if the income and profits be insufficient for that purpose, the guardian may sell the real estate, upon obtaining a license therefor as provided by law, and shall apply the proceeds of such sale, so far as may be necessary, for the maintenance and support of the ward and his family." (Emphasis supplied.)

A.C.L.A. 1949, 62-2-2, p. 2179.

"When the income of the estate of any person under guardianship, whether as a minor, insane person, or spendthrift, shall be insufficient to maintain the ward and his family, his guardian may sell his real estate for that purpose, upon obtaining a license therefor and proceeding therein in the manner hereinafter provided."

A.C.L.A. 1949, 62-3-1, p. 2183.

"When it shall appear upon the representation of any such guardian that it would be for the benefit of his ward that his real estate, or any part thereof, should be sold, and the proceeds thereof be put out on interest or invested in some

> productive stock, his guardian may sell the same accordingly, upon obtaining a license therefor and proceeding therein as hereinafter provided."
>
> *A.C.L.A.* 1949, 62-3-2, p. 2183.

As will be seen from the quotations above made, the Probate Court in Alaska, while not an equity Court as such, is the Court of original and general jurisdiction in probate matters, including supervision over guardians of incompetent persons. The guardian is not only authorized but is directed to "manage" and to control the estate of his ward under supervision of the Court. The statute contemplates that the property of the ward is to receive income and that in turn presupposes that the property will be rented or leased to the best advantage of the estate.

In this case appellant concedes that the property could be leased for some period of time but claims that there is no authority "authorizing the making of a lease for a long period of time on the property belonging to an insane ward" (brief 77).

It is not contended by appellee that the guardian held title to the property. It is contended that it was the duty of the guardian to manage the estate of his ward to the best advantage of the estate. Under all the facts and circumstances it was and is highly advantageous to such estate that a long-term lease be made in exchange for the construction to be carried out by appellee.

> "Under law that conservators 'shall have the charge of' and 'shall manage' the estates of their

wards, such conservators have power, by virtue of their appointment, and without first obtaining authority from the Court of Probate, to lease the premises of their wards for what in view of all the circumstances is a reasonable time."

Palmer v. Chesbro, 55 Conn. 114, 10 Atlantic 508;

Bates v. Dunham, 58 Iowa 308, 12 N.W. 309;

Cypress Creek Coal Co. v. Booneville Mining Co., 194 Ind. 187, 142 N.E. 645;

Martin v. Smith, 214 Minn. 9, 7 N.W. (2d) 481;

Ricardi v. Garbory, 115 Tenn. 484, 89 S.W. 98.

We find nothing in the record or in appellant's brief which would require reversal of the trial Court's finding that the lease as made was, and is, valid and binding.

In argument of his points Nos. 18, 19, and 20, appellant again asserts that the rent and reasonable use of the property far exceeds the expenditures of appellee on the property. We have already answered that contention briefly. Suffice it to say here that at the trial appellant was specifically invited to give his idea of rental value of the lot alone as distinguished from the lot and building, and he wouldn't hazard an opinion (R 445). The only evidence as to rental values was as to an adjoining building and as to this lot as improved by the building constructed by appellee. As to the first, there is no showing that the properties were comparable. In fact, as we have shown, according to the undisputed evidence in the record the building formerly on the lot in question in 1941 was

dilapidated and in such poor shape the City of Anchorage wouldn't allow its repair. As to the second, surely applicant cannot in one breath contend that the building now on the premises is not his until the expiration of the lease, and in the next claim that the rental value and income from that building should be used in determining the rental value of the property. Probably the best way to get at that matter, if it is important, is to take the value of the real property over the years as it appears from the record and apply the rental formula of fifteen per cent of value as testified by appellant's witness, Mr. Bachman. If we do that, we get the following results:

Year	Value of Land (According to Tax Assessments)	Rental Value (At 15% Value of Land)
1941	$ 1500	$ 225.00
1942	2000	300.00
1943	2500	375.00
1944	3000	450.00
1945	3500	525.00
1946	3500	525.00
1947	18,000	2700.00
1948	18,000	2700.00
		$7800.00

During the same period defendant had expended over $38,000 in improving the property and had paid $4320 to appellant in rent.

In conclusion, appellee believes that the record shows conclusively that there is ample evidence to sustain the findings and conclusions and decree of the trial Court.

We believe that appellant long ago should have arranged a sale of the property to maintain his ward and invested the balance so that his ward could have been maintained in cheerful, happy surroundings instead of in a public asylum. Appellant believed it was his duty to keep the property intact for the benefit of the heirs of the ward when he shall have died. We believe the record is conclusive that the guardian had sufficient funds to pay the 1948 taxes when due and thus avoid penalty and interest. He did not see fit to do so. We believe from the record that the guardian, if he had wished to do so, could have secured a modification or at least a postponement of the effective date of the order requiring payment to the United States. We believe that in any event since such order does not create a lien, whereas the taxes were a specific lien against the property, that if necessary to defer one or the other, the payment of the money due the government should have been deferred. All these matters are in the discretion of the guardian and his action on them is his business. However, we feel that it is not fair that the guardian should attempt to cancel the lease and take over defendant's improvements under the facts and circumstances here existing.

Appellant repeatedly has alleged that the lease is unjust, inequitable, oppressive, and confiscatorial, and that appellee has by its inequitable conduct attempted to force a sale of the property so it could be purchased at less than its value. We submit there is no evidence at all to support any of those contentions. We believe there is ample evidence in the record to support the

findings and the conclusions of the trial Court and that appellant has no just cause to complain of the decree entered by the trial Court. We believe the decree of the trial Court should be affirmed.

Dated, Anchorage, Alaska,
January 29, 1951.

Respectfully submitted,
DAVIS & RENFREW,
By EDWARD V. DAVIS,
Attorneys for Appellee.

No. 12590.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

EDWIN L. CARTY, H. MCCORMICK, EUGENE DOUD, JAMES R. DOUD, VINCENT DOUD, RAYMOND E. FARRELL, JAMES D. MCCORMICK, ROBERT MAULHARDT and EDWARD C. MAXWELL,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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No. 12590.

IN THE

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FOR THE NINTH CIRCUIT

EDWIN L. CARTY, H. MCCORMICK, EUGENE DOUD, JAMES R. DOUD, VINCENT DOUD, RAYMOND E. FARRELL, JAMES D. MCCORMICK, ROBERT MAULHARDT and EDWARD C. MAXWELL,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

Statement of Pleadings and Facts Disclosing Jurisdiction.

This is an appeal from a judgment of conviction for the violation by appellants of Section 703, Title 16, United States Code, and regulations pertinent thereto, which makes it an offense to hunt and kill or attempt to kill and take migratory waterfowl and migratory game birds over baited ponds and also by means, and use of shelled wheat, corn, and other grain, or other feed deposited, distributed and scattered so as to constitute for such birds a lure, attraction, or enticement to fly over the area where hunters are attempting to take them. All appellants were charged with the aforesaid violation jointly in a one count Information, and trial by jury was had in the United States

District Court for the Southern District of California at Los Angeles, Calif., resulting in a conviction of said offense. The jury returned the verdict of guilty on March 9, 1950. A motion for new trial was made, heard and denied on March 20, 1950, by the Honorable Harry C. Westover, Judge presiding. On the same date the Court sentenced each of the appellants to pay a fine to the United States in the sum of $500 each.

A notice of appeal to this Court was filed on March 24, 1950, at Los Angeles, Calif., which Court has appellate jurisdiction under Title 28, U. S. C., Section 1291. The District Court had jurisdiction under Section 3231 of Title 18, U. S. Code.

Statement of the Case.

Facts.

The statement of facts set forth in appellants' opening brief, commencing on page 2 thereof, is not acceptable to appellee for the reason that the statement is too selective and interpretative as well as argumentative. The following summary of the evidence pertinent to the questions before this Court is submitted as a more objective synopsis, as opposed to the "shotgun approach" to the facts made by appellants.

At approximately 6:00 o'clock P. M., October 21, 1949, Deputy United States Game Wardens inspected the premises of the Santa Clara Game Preserve near Oxnard, California, at which time it was observed that the ponds, dikes and roadways of such premises were heavily covered with threshed barley and lima beans. United States Game

Management, Agent, A. W. Elder, of Los Angeles, was that evening notified of such fact; later the same evening Agent Elder further inspected the premises and confirmed the observations made by the Deputy United States Game Wardens.

On the following morning, October 22, 1949, at 7:00 o'clock A. M., the defendants were observed among others hunting and taking wild ducks on the said premises of the Santa Clara Game Preserve. Thereupon Agent Elder and the Deputy United States Game Wardens, all of whom had been making such observations, entered upon the said premises, as some of the hunters were beginning to leave their duck blinds where they were shooting. On entering the premises it was again observed that a roadway thereon, adjacent to the ponds, and several of the dikes upon the premises, were covered with lima beans and threshed barley. As the hunters came in from their hunting stations their names and addresses were taken, their thirty-five ducks and one goose confiscated, and each hunter notified of an apparent violation of the Federal Laws against baiting of migratory waterfowl. All defendants except Vincent Doud and Raymond W. Farrell were so apprehended and their ducks confiscated at this time. At about 1:30 P. M. of the same day the other two defendants were observed shooting over the same premises, under the same conditions as aforesaid. They were likewise notified by Agent Elder and Deputy United States Game Wardens of the Federal violation and their birds confiscated.

Thus, there are two essential elements of the offense charged in the information:

First: The taking, hunting, or killing of migratory game birds;

Second: Over ponds or other hunting areas by means, aid, and use of shelled grain distributed thereover so as to constitute a lure, attraction and enticement to such birds.

The first half of the 1949 duck hunting season opened for shooting at noon on October 21 [R. 72-73]. On October 8, 1949, thirty-six sacks of dried lima beans were emptied on the southwest corner of the club, which occupied about forty acres. Each sack of lima beans weighed about 100 pounds, or a total of 3,600 pounds or one and three-fourths tons. Also, it is uncontroverted that forty-one sacks of grain barley were distributed on the grounds of the club prior to the opening of the 1949 duck season. Each sack weighed about 90 pounds or a total of approximately one and three-fourths tons of grain in addition to the lima beans [R. 394-395]. Of this it is admitted by appellants that three-fourths was net grain or one and three-eighths tons, while the remaining 25% was radish seed, chaff or foreign matter [R. 398 and App. Op. Br. p. 4]. The last distribution of grain was made on October 13, 1949, or approximately one week before the shooting season opened. The evidence was conflicting on the question whether ducks would eat lima beans, but appellants concede that testimony was received from which a jury could have believed that lima beans would be eaten by ducks as feed, especially if they were hungry [App. Br. p. 5 and R. 126, 209, 213 and

332]. See also 255, 257 and 259 of Record. Appellants at no time deny or raise the issue as to whether or not grain barley such as distributed here constituted feed that ducks would eat, whether hungry or not. The testimony was that ducks and geese would definitely eat barley [R. 238]. Appellant Maxwell, who was Secretary-Treasurer of this Club [R. 267-268], was told by Deputy U. S. Game Warden Edgerton, when the feed question was raised, on October 8, 1949, that other clubs had been advised and it was mutually agreed that if they stopped feeding 10 days before the season, the *feed should* be eaten up, but it was further stipulated that under no circumstances were they *to shoot* over a baited area [R. 240]. (Emphasis ours.)

This conversation began from Maxwell's inquiry of Edgerton as to whether there had been any changes in the feeding regulations for the 1949 season [R. 267]. Appellant Maxwell then requested Edgerton to call Earl Macklin [Asst. Chief Patrol for Calif. Div. of Fish and Game—R. 319] about whether the regulations had been changed and to let him know [R. 267-268]. Macklin had a conversation with Maxwell on Oct. 19, 1949, and discussed feeding seventy-two hours before the season opened. He told Maxwell that appellant Carty brought up the question before the Fish and Game Commission at a meeting in San Francisco, Nov. 5, 1948. The question was more or less threshed out at this meeting—and Carty was told that while seventy-two hours might be a reasonable time, it made no difference whether it was seventy-two hours or eighty-six hours, the fact still remained that the feed must be cleaned up before the shooting started [R. 322-323]. Maxwell was told there was no definite

time but the feed must be cleaned up before shooting started on any club, as that would constitute a violation of Federal Regulations [R. 322]. This advice to Carty and Maxwell resulted from a legal opinion from the State Attorney General's office on the interpretation of the Federal regulation [R. 322-323]. Maxwell was told by Macklin that he felt if the club was reasonably cleaned up, there wouldn't be any arrests made and that wardens under Macklin's supervision were instructed not to make any "technical arrests." Macklin was a defense witness [R. 319, 325].

On October 22, 1949, Maxwell called Macklin and reported they had been arrested, and admitted to him that there was some feed on the premises that day [R. 330]. Macklin further testified in his opinion the grain shown in the picture shown to him, and so identified in Government's Exhibit No. 4, would be a violation [R. 334-336].

Appellants Carty and James McCormick knew there was a quantity of lima beans in the area. On the day the season opened, and after he had his limit of ducks, Carty told Jack Bedwell, who was a Deputy U. S. Game Warden, "Those beans out there look bad and they should be covered up" [R. 348, 401, 402 and 408]. He admitted that A. W. Elder, U. S. Game Management Agent, said he had warned him (Carty) in 1948 about shooting over baited ponds [R. 355].

Elder testified he inspected the Santa Clara Club on October 22, 1949, and found grain broadcast and scattered quite widely in the center of the club shooting area—barley along the cross dike—in very heavy dribbles where it appeared a sack had been carried on someone's shoulder, allowing barley to leak out where it was carried, with here

and there a little pile or so, approximately five or ten pounds estimated in each pile [R. 180-181]. He with other wardens, Bedwells, Spicer and Edgerton, saw and heard shooting in the area and ducks fall to various hunters [R. 183]. Seven appellants were arrested in the morning and two more in the afternoon. All had shotguns, and their birds were confiscated as evidence [R. 208, 209].

Contrary to the statement made by appellants in their brief at the center of page 15, the ducks and one goose *were* offered in evidence, as follows:

> "Mr. Johnson: The Government wishes to make an offer of evidence. Should counsel for the defense (Testimony of Alvin W. Elder) require them, we [190] could bring these frozen ducks and one goose into court.
>
> Mr. Irwin: It is not necessary. I will stipulate the defendant had the ducks and the other.
>
> Mr. Johnson: And the goose.
>
> Mr. Irwin: That's right."

Government Exhibit No. 4, in evidence, was further identified as being a picture of barley on the ground, which was found in practically every foot of the premises, except cross dike No. 5 [R. 195-196]. Also, Elder saw the "lima beans spread as if the tail gate of a dump truck had been cracked open a couple of inches and backed down a road spreading them quite evenly." Elder's first inspection of the premises was made upon arrival at the prem-

ises about 1:00 A. M., October 22, 1949, after Warden Spicer called him at Bakersfield from the Ventura-Oxnard area, about 8:30 P. M., October 21, stating that the Santa Clara Game Preserve (appellants' club) was baited with barley [R. 177-178]. Samples of barley and lima beans were received in evidence as Government's Exhibits Nos. 12, 13 and 14 [R. 198, 200, 202 and 203].

Warden Spicer inspected the club area at night with flashlight and later returned 6:30 A. M. the 22nd, after seeing a quantity of grain everywhere, taking samples, and after meeting with Wardens Bedwell and Edgerton. They parked their cars at the edge of the Santa Clara river bottom, about two-tenths of a mile from the club and observed hunters with binoculars, later identified as appellants, on this particular club shooting ducks.

Questions Involved.

I.

Whether the Court committed error in not submitting the issue of entrapment to the jury?

A. Whether or not there was any evidence of entrapment which a jury should have passed upon as a question of fact?

II.

Whether Government Instruction 19-a was a correct statement of the law, as applied to this case?

A. If not, whether the error, if any, was harmless?

ARGUMENT SUMMARY.

Only two real issues are presented by this appeal, first whether the trial court committed error in holding as a matter of law the defense of entrapment was not available to appellants, thus refusing to submit that issue to the jury with appropriate instructions. Second, the appellants complain of Instruction 19-a which they claim left the impression with the jury that pre-season feeding was an indirect method of baiting, and therefore illegal.

Neither position taken by appellants has any substantial merit. Neither position is tenable upon the reading of the entire record of evidence and all of the instructions given. There was not the slightest degree of entrapment here by Federal Wardens or agents, within the meaning of the standard set by the leading *Sorrells* case. None of the appellants was induced, enticed or "decoyed" into shooting over baited ponds or areas. The only decoys present here were those planted by appellants, figuratively speaking. Not the floating imitation ducks as decoys, but the real entrapment in this case was the presence of grain, barley, and other feed such as lima beans in the area which the jury found constituted a lure, enticement and attraction to wildfowl to come within range of the hunters' shotguns.

The offense as charged in the Information was that simple. Either these appellants did or did not shoot, hunt and take or attempt to take migratory birds over such a baited area. Lack of knowledge of such conditions and

the existence of grain or feed is no defense. Hunters shoot or hunt at their own peril under the law here.

However, one appellant, Carty, had been warned in 1948 by the Chief Federal Wildlife Conservation Agent, A. W. Elder. Again Carty was told at a State Fish and Game Commission meeting in San Francisco in 1948 that it mattered not how long or how short a time before the season opened that feeding stopped on the clubs, the important thing was that no grain or feed whatsoever be present in the area where hunting took place during the season. The Act and regulations specify no time limit within which pre-season feed or grain may be scattered or distributed. The controversial instruction implies that none may be put out and be left there prior to the season, and remain there after the season opens. It is uncontroverted that feeding after the season opens would be a violation.

The instructions as a whole were clear on the law as it applies to the case. When read in its proper setting, it is inconceivable that the instruction in question could have misled anyone. If any errors was committed, which is not conceded, it was harmless, the defect having been cured by other instructions.

The main purpose of the Migratory Bird Treaty Act and its regulations is to preserve and conserve our wild life resources. It provides a limited season within which ducks, geese and other migratory birds may be hunted. It prohibits hunting over baited areas. The reason for

this is to equalize the contest between hunters and birds and to prevent a possible slaughter of birds attracted by quantities of grain or food, put out as a "lure or trap."

The Act further insures good sportsmanship and applies to all hunters alike, therefore it is equitable. Congress recognized the need for regulation to perpetuate an outdoor sport that is an American tradition. To do this it is necessary for a reasonable percentage of wildfowl to reach their winter home in southern climates and return northward in the spring for nesting and reproduction. In migrating from Canada to Mexico, millions of birds fly across the United States, and stop over to feed or remain awhile on or near waters in Southern California.

The law applies to appellants here and is for their benefit in years to come as men who enjoy the sport of hunting ducks. It applies in this case to protect the privileges of other hunters, elsewhere in this country, now, and those in years to come.

The evidence is overwhelming to support the verdict of the jury finding appellants guilty. No error of law was committed by the trial court prejudicial to the appellants, and the judgment should, therefore, be affirmed.

I.

The Court Committed No Error by Not Instructing the Jury on the Issue of Entrapment.

A. Where There Is No Possibility of Entrapment, That Issue May Not Be Given to the Jury. It Is Only Where the Trial Court Finds There Is or May Be an Entrapment, That the Defendant Is Entitled to an Instruction Thereon.

On the basis of the record here and the evidence received herein, the defense of entrapment was not available to appellants. The trial court was justified in holding as a matter of law that no entrapment existed here and properly refused to submit the issue to the jury as a question of fact. So held in:

Brown v. United States (9 Cir., 1919), 260 Fed. 752.

To the same effect:

Farber v. United States (C. C. A. 9th), 114 F. 2d 5, at p. 10; cert. den., 311 U. S. 706.

"It is claimed that appellant was entrapped and therefore the judgment should be reversed. This defense is applicable only where the officers instigate the crime charged and committed, but does not apply, as here, where the officers discover the criminal in the doing of the crime which has already been instigated or already commenced or planned. See the leading case of Sorrells v. United States, 287 U. S. 435, 53 S. Ct. 210, 77 L. Ed. 413, 86 A. L. R. 249. To allow the defense of entrapment here would be to bar conviction wherever the Secret Service allowed the crime already conceived to be carried out sufficiently to obtain evidence necessary for a conviction of the crime. The defense of entrapment is not here sustained."

See also:

Ratigan v. U. S., 88 F. 2d 919, at 922;

U. S. v. Bates (7 Cir., 1944), 141 F. 2d 435, at 436.

Appellants rely upon the leading case on entrapment, namely, *Sorrells v. United States,* 287 U. S. 435. A rereading of that case indicates the facts are entirely different from this one and therefore distinguished. It was a prohibition case. Sorrells was lured by the agent to commit a crime of which he was otherwise innocent. This was by repeated and persistent solicitations, and by taking advantage of the sentiment aroused by reminiscences of their experience as companions in the First World War (see page 441 of the *Sorrells* Opinion).

That case annouunces the well settled rule that artifice may be employed to catch those engaged in criminal enterprise and that the government may afford opportunity which of itself will not defeat prosecution.

That case concluded by holding that the defense of entrapment was available and that the trial court erred in holding as a matter of law there was no entrapment and in refusing to submit that issue to the jury.

In the present case nothing positive was done by government agents to induce or plant in the minds of appellants and create there a disposition to commit the original offense. This was pointed out by the trial court in the conference on instructions, with both counsel present [R. 466-467]. No Federal Game Warden suggested or planned the distribution of the barley and lima beans over the shooting area of the Santa Clara Club. No Federal officers procured or induced the situation of hunting over

this area by appellants at the opening of the 1949 duck hunting season. In fact the club was open to members only and their guests for hunting. Each one had to procure his own hunting license, buy his own duck stamp, supply his own shotgun, arise unusually early in the morning of the day they were arrested.

Each one had to draw "lots" at the "chuck wagon" for his location in the blinds. Each one had to fire his own shots to bring down the ducks he took that day and it requires no small degree of skill in marksmanship to do that. Each hunter proceeded to hunt at his peril in relation to the condition of baited ponds or areas at the club.

Further consideration may be disposed of in passing. In a prosecution for violation of the Migratory Bird Treaty Act, the prosecution is not required to aver or to prove at trial that a defendant had knowledge of unlawful baiting of hunting grounds in order to render him amenable to punishment for violation. Congress intended to require in this regard that hunters shall investigate at their peril conditions surrounding the fields in which they seek the quarry.

United States v. Reese, 27 Fed. Supp. 833.

That guilty knowledge or intent is not required in such cases was likewise held by the Court in *United States v. Schulze,* 28 Fed. Supp. 234 (1939), and see *United States v. Olson,* 41 Fed. Supp. 433, 434. Furthermore, it is clear that successful hunting or killing or capturing of migratory birds is not a requisite of guilt. Regulation 6.2 issued by the Fish and Wildlife Service, under the Secretary of the Interior, provides as follows: "* * * (e) Take—Hunt, kill or capture, or *attempt* to hunt, kill or capture." (Emphasis ours.)

In the pre-season inquiry by Maxwell and Carty, apparently on behalf of the others, since these two were in a favored position in the club, the wardens were told of the grain existing there and the beans. There was some discussion about the possibility of the grain or other feed being eaten or not eaten before the season opened. At no time or place did any warden tell appellants they could go ahead and shoot if grain or feed still remained there. In their brief and argument appellants urge that all the pre-season feed should have been eaten, calculated on the amount of grain a duck ordinarily eats per day, and the estimated number of ducks that should have been there. Either the ducks did not come in such numbers, or they did not eat enough to make the feed disappear. The jury found as a matter of fact there was ample grain or other feed there sufficient to constitute a lure, enticement and an attraction for the birds to come in.

The game wardens were there to investigate and enforce the provisions of the Migratory Bird Treaty Act and its regulations. They did investigate the conditions there during the night of October 21 (Spicer and Elder) and found grain and beans in quantity scattered about the club. When the appellant hunters moved in at daybreak, or later, and did shoot and kill thirty-five ducks, and one goose, it was the duty of the wardens to make arrests.

In the case of *Newman v. United States,* 299 Fed. 128, 131, 4th Cir., Judge Woods stated the principle that:

> "Decoys may be used to entrap criminals and present opportunity to one intending or willing to commit crime. But decoys are not permissible to ensnare the innocent and law-abiding into the commission of crime. When the criminal design originates, not

> with the accused, but is conceived in the minds of the government officers, and the accused is by persuasion, deceitful representation, or inducement lured into the commission of a criminal act, the government is estopped by sound public policy from prosecution therefor."

The only decoys to be found in this case were not planted by federal agents, but by the appellants themselves. The only persuasion, lure and inducement on the record here is found in the existence of grain, barley and beans there to "entrap" the migratory birds to come within shooting range.

The fundamental purpose of the statute making it unlawful to hunt or kill, except as permitted by regulation, any migratory bird included in terms of conventions between the United States and countries mentioned therein for protection of migratory birds, and the regulations thereunder promulgated by the Secretary of the Interior, is the protection of migratory birds from destruction in an unequal contest between hunter and bird.

United States v. Olson, 41 Fed. Supp. 433 (1941).

As stated in the report of the Special Committee on Conservation of Wildlife Resources to the 77th Congress, 1st Session, pursuant to Senate Resolution 246 thereof:

> "The ultimate objectives of the entire waterfowl program are: (1)To restore, so far as is economically possible, the breeding grounds within the continental United States; (2) to provide feeding areas along the routes of migration and in the wintering grounds in the South adequate to care for the enormous concentrations of birds that occur in the United States during the critical winter months; (3) to pro-

vide reasonable hunting privileges for the more than 1,000,000 duck and goose hunters; and (4) to so regulate the kill that the supply of birds will fully populate all available breeding areas, and thus assure continuation of the sport of wildfowling."

See, also, in connection with the policy and purposes of the Treaty and the Congressional Act, the following:

Cerritos Gun Club v. Hall, supra, 96 F. 2d 620, 629, and

Shouse v. Moore, 11 Fed. Supp. 784 (1935).

Equally well settled is the proposition that hunters have no property right in migratory birds but only such permissive privileges as governmental authorities decree.

Missouri v. Holland, supra, 252 U. S. 416, 434;

Brandenburg v. Doyle, 12 Fed. Supp. 342, 344;

Shouse v. Moore, supra, 11 Fed. Supp. 784, 787.

Nor is the Government's power to protect or regulate the hunting of migratory waterfowl confined to those lands to which it has title.

It is therefore submitted there was not a scintilla of evidence of entrapment here such as existed in the *Sorrels* case. It would have been error had such an issue been submitted to the jury for their deliberation. The trial court found no entrapment in the evidence and there was none. Under such facts as were established here, Carty had been warned a year before about shooting over baited areas; Maxwell, who was Secretary-Treasurer of the Club, had been told before the season opened that under no circumstances could they shoot legally over baited areas. They went ahead and shot anyway and invited their friends or guests to shoot there. The jury found after hearing all the evidence, some conflicting, that grain and

feed did exist there in quantities sufficient to lure and entice birds. Therefore, the theory of entrapment is reduced to absurdity.

Much controversy arose over the lima beans. Carty and other appellants, or defense witnesses, as well as some of the game wardens cast some doubt on whether ducks would eat beans. Some testified they would if hungry enough. How could they defend on the theory that hunting was legal and safe, by assuming the ducks were not hungry enough? Only a duck knows when he is that hungry [See R. 256]. Appellants speculated that sufficient numbers of birds would clean up the barley, but this never happened. They were satisfied to allow the beans to remain, regardless.

That issue was immaterial anyway whether ducks would eat the beans. The real question was whether the beans constituted a lure or enticement to waterfowl in coming to that area. The jury must have so found after one direct instruction placing that issue squarely before them.

Regardless, there was ample evidence to sustain the verdict in that substantial amounts of barley were there besides, according to the testimony of Elder and Spicer as well as others. The jury evidently chose to believe their testimony in this regard as shown by their verdict. Of course the credibility of witnesses and the weight of the evidence is a matter for the jury alone, and may not be disturbed upon appeal, although the appellate court might have reached other conclusions. This principle is so well founded it requires no citations of authority. Where reasonable minds may differ on such questions of fact and there is sufficient evidence to sustain the verdict, as here, the findings of fact will not be disturbed.

II.

The Court Committed No Error in Giving the Government's Requested Instruction No. 19-A.

A. If Any Error Was Committed the Defect Was Cured by Other Instructions and Therefore Was Harmless.

The Court's Instruction No. 38 [R. 26-27] also designated as Government's Requested Instruction No. 19-A [R. 26-27] was a correct statement of the law as applied to the facts of this case. There was no prejudicial error committed in so giving this instruction which clarified the meaning of the applicable section of the Migratory Bird Treaty Act, as amended, 16 U. S. C. A. Sections 703-711, and the regulations pertinent thereto. Said instruction was based upon a construction and interpretation of the same statute and regulations made by this Court in the case of *Cerritos Gun Club v. Hall,* on April 15, 1938, as reported in 96 F. 2d 620.

In order to analyze the Court's instruction complained of by appellants, it is necessary to place that instruction in its proper setting in relation to the other instructions given by the Court immediately prior to its having been given to the jury.

The Court's instructions on the basic statute involved herein and the regulations pertinent thereto, namely, Sections 703-11 of Title 16, U. S. C. A., also known as the Migratory Bird Treaty Act, as amended, and the regulations promulgated by the Department of the Interior under the authority of said Act and in particular Section 6.3 were set forth in the following instructions which

were given to the jury in the following order. [R. 453-457 incl.]

"Section 703 of Title 16, United States Code, provides in part that:

" 'Unless and except as permitted by regulations made as hereinafter provided in Sections 703-710 of this title, it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill, possess,' * * * (or) * * * 'any migratory bird * * * included in the terms of the conventions between the United States and Great Britain for the protection of migratory birds concluded August 16, 1916 (39 Stat. 1702), and the United States and the United Mexican States for the protection of migratory birds and game mammals concluded February 7, 1936. * * *'

"On July 29, 1948, the President of the United States approved and proclaimed a regulation propounded by the Fish and Wildlife Service of the United States, Department of the Interior, under the authority of the Migratory Bird Treaty Act which I have just read to you. That regulation provides in Section 6.3, in part, as follows:

" 'Waterfowl (except for propagating, scientific, or other purposes under permit issued pursuant to Section 6.8), and mourning doves and white-winged doves are not permitted to be taken, directly or indirectly, by means, aid, or use of shelled, shucked corn, or of wheat or other grain, salt, or other feed that has been so deposited, distributed, or scattered as to constitute for such birds a lure, attraction, or enticement to, on, or over the area where hunters are attempting to take them: Provided, however,

such birds may be taken over properly shocked corn and standing crops of corn, wheat, or other grain or feed, and grains found scattered solely as a result of agricultural harvesting.'

"Thus, this regulation which I have just read to you has the effect of law, since it was propounded under the authority of the Migratory Bird Act of 1918, as amended.

"Section 707 of Title 16, United States Code, provides in part that:

" 'Any person, association, partnership, or corporation who shall violate any of the provisions of said conventions or sections 703-711 of this title, or who shall violate or fail to comply with any regulation made pursuant to said sections, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be * * * (punished as the law provides). Thus, there are two essential elements of the offense charged in the information:

"First: The taking, hunting, or killing of migratory game birds;

"Second: Over ponds or other hunting areas by means, aid, and use of shelled grain or other feed distributed thereover so as to constitute a lure, attraction and enticement to such birds.

"There has been testimony that barley and lima beans were found on the premises. It is admitted that barley is grain. The testimony is conflicting as to the amount of barley found on the Santa Clara Game Preserve. It is for your determination as to whether it was present in such quantities as to constitute a lure or enticement for the ducks present, which have been estimated variously between 4000 and 12,000 in number.

"As to the lima beans, you must first determine whether, under the terms of the regulations, lima beans are in the category of 'other feed,' which will lure, entice or attract migratory birds.

"You are further instructed that in a case of this sort, it is not necessary for the government to allege or to prove at trial that a defendant or defendants had knowledge of unlawful baiting over hunting grounds to find him guilty of the offense charged. In such case, guilty knowledge or intent is no part of the issue of the case. In this regard it is required that hunters shall investigate at their peril the conditions surrounding the fields and areas in which they are doing their hunting. Thus, the fact that a particular defendant may claim he did not know the area in which he was hunting was baited as charged in the information may not be considered by you in determining his guilt or innocence of the crime charged. He was under a positive duty to investigate for such conditions before hunting in the area. You are instructed that hunters have no property right in migratory birds, but only such permissive privileges as governmental authorities decree.

"Nor is the government's power to protect or regulate the hunting of migratory waterfowl confined to those lands to which it has title.

"You are instructed that you need not be concerned whether the particular birds in this case are in fact migratory, that is, whether they have actually ever been anywhere other than California in their native haunts; for once the evidence establishes that the particular birds taken are of the species or type included in the Migratory Bird Treaty and the Congressional Act and Regulations in connection therewith, the question of whether those particular birds

actually went out of this state or were raised in this state, or whether they came from Canada, or elsewhere, is not in issue. The only issue, then, is whether the defendants hunted or killed the migratory birds as charged in the information.

"In this connection testimony has been produced to the effect that the birds taken from defendants by the enforcement officers, involved in this case, were of the following types: Sprigs, also known as Pintails, Spoonbill, Greenneck Teals, Redheads, Widgeons, and Cackling Geese.

"You are therefore further instructed that as a matter of law all birds of these types are migratory birds within the meaning of the Treaty and the statute and regulations concerned in this case." [R. 453-457 incl.]

Immediately following the above instructions the controversial instruction designated as 19-A was given to the jury, which is as follows:

"You are instructed that the regulations concerning the baiting of migratory birds is violated whether the hunters had pursued the indirect method of baiting before the season opened so as to keep the birds in the hunting area to be shot after the season opens, whereupon the hunters may flush them as they walk or punt over the preserves, or by directly placing the grain or other feeds in front of the blinds or stands during the season.

"Furthermore, concerning the provisions in the regulation that migratory birds are not permitted to be taken 'directly or indirectly' by means of bait, you are instructed that the word 'indirectly' equally applies to any luring of the birds by grain or other

feed to the hunting area, regardless of whether the grain or other feeds is spread before the bird blinds themselves or is more widely scattered." [R. 457-458.]

The first paragraph of the said controversial instruction was taken from page 624 of the *Cerritos* case Opinion under headnote [4], in which this Court expressed the opinion that the Secretary's regulation would have been violated by the indirect method of baiting before the season opens, so as to keep the birds there to be shot after the first day of the season. Obviously in the light of the regulation itself this would mean that grain would still prevail in the hunting area after the opening of the season which would constitute a lure and enticement to the migratory birds. Obviously there would be no violation if the pre-season feeding of grain resulted in the grain or other food put out being consumed by the birds, or being covered up by the owners of the land, or those who desired to shoot over such premises. It is absurd to conceive of baiting the area, or spreading the grain during the open season without this resulting in a clear, intentional violation of the Act and its regulations. The only issue raised in this instruction was whether or not the jury understood the Court to say that pre-season feeding was a violation *per se*. In view of the trial court's instruction above, to the effect that the jury was to determine whether grain was present in such quantities as to constitute a lure, or enticement for the ducks present, the first paragraph of the controversial instruction constituted a harmless error, if any.

It is inconceivable that a jury made up of reasonable men and women could be mislead by such instruction to

the prejudice of the appellants. If any difficulty existed because of the wording of this paragraph of the instruction, it is submitted that it was cured by the submission to the jury of a clear issue of fact as to whether or not at the opening of the season barley and beans were present in sufficient quantities to induce or entice ducks to settle there and be shot by the hunters on the premises. This appellate court in its Opinion in the *Cerritos* case must have had the same thing in mind in its Opinion as aforesaid concerning baiting before the season opened.

On page 628 of the Opinion in the *Cerritos* case, the Court recognized that in California the feeding of grain begins weeks before the shooting season. The Court raises the question then, without answering it, did the writers of the Treaty consider baiting before or during the season a shortening of the time of the season? There is nothing in the regulations or the Act itself which expressly prohibits the pre-season scattering of grain or wild fowl feeding. However, the regulation is clear and definite in saying that no waterfowl shall be taken over areas where there exists wheat, *or other grain, or other feed,* which has been so deposited, distributed or scattered so as to constitute a lure, attraction, or enticement to, on, or over the area where hunters are attempting to take them. In view of the trial court's instruction concerning all of these things, it is submitted that no prejudicial error was committed in giving the jury this part of the instruction.

As to the second half of the instruction, the trial court again followed the example and expression of the law and its construction as applied to migratory waterfowl as set

forth in the *Cerritos* case on page 629 thereof, this Court stated the law as follows:

> "Nor is there weight in appellants' contention that there is such vagueness in terms '* * * Not permitted to be taken by means, aid, or use, directly or indirectly, of corn, wheat, oats, or other grain or products thereof, salt, or any kind of feed whatsoever, placed, deposited, distributed, scattered, or otherwise put out whereby such waterfowl or doves are lured, attracted, or enticed, * * *' that the offenders are not properly advised of the offense. Common sense discloses exactly what these words mean; it being held that 'indirectly' clearly applies to any luring by grain of the birds to the hunting areas, regardless of whether the grain is spread before particular blinds or more widely scattered."

On this point the Court was holding that the regulation involved in the *Cerritos* case, which was almost identical to the regulation involved here, did not lack the definiteness necessary to describe a penal offense. It further held that the making of the regulation against baiting was not a delegation of legislative powers (p. 629, Note 12). The Court went on to say:

> "* * * The policy of the act is determined by section 3 of the act itself, as amended. 16 U. S. C. A. §704 and note. It is 'to carry out the purposes of the convention,' which are: 'Saving from indiscriminate slaughter' and 'of insuring the preservation of such migratory birds as are either useful to man or harmless.' Certainly it is 'rationally conceivable' by the Congress that prohibiting baited hunting will aid in preventing the extinction of the waterfowl, as the carrier pigeon was extinguished."

> Instruction 19A was given because the Court believed it to be the law in this district. The second paragraph in particular became essential since the defendants (Appellants) claimed that the "congregation of ducks was greatest away from those beans, and so on, and it was the fresh water that attracted the ducks." The Court ruled that such was a question to be argued before the Jury. [R. 464.]

True, the *Cerritos* case was a civil action and the extracts from this Court's opinion may have not been essential to the holding therein, therefore dictum. Yet, the gun club sought to enjoin Peirson M. Hall, then United States Attorney, and other Federal officers from prosecuting the plaintiffs for luring migratory birds to their properties with grain, there to be shot by their stockholders and members. Plaintiffs appealed from a decree dismissing this bill without leave to amend (21 Fed. Supp. 163). This Court affirmed, and upheld the validity of the Act in a well considered opinion that explored the many facets of the Migratory Bird Treaty Act and its regulations. Where then, may a trial court go for better guidance for its jury instructions on the law of a case such as the one in which appellants were tried and convicted? They were charged with shooting ducks over baited ponds, that is over an area where it was conceded and admitted that grain and lima beans were distributed in quantity prior to the opening of the 1949 hunting season. The main issue of fact submitted to the jury was whether the appellants did take or attempt to take waterfowl over an area—in violation of the Act and its regulations. This required a finding of fact on one further issue, whether grain or other feed was present there in sufficient quantity

to constitute a lure and enticement to ducks to come there and be shot by hunters. Having instructed on the elements of the case and the basic law involved, the trial court attempted to clarify and enlarge upon the meaning of the regulations. In doing so, it drew upon the language of the United States Court of Appeals in our own Circuit. It may be said that Instruction 19-a was superfluous; that it was unnecessary once the mandatory instructions on the law of the case and the elements of the offense had been stated to the jury. For men and women of ordinary intelligence this would have been sufficient for as this Court said on page 629, of the *Cerritos* case, common sense discloses exactly what the words of the regulation mean, especially the definition of *"directly* and *indirectly."* This referred to the taking of birds by means of, and the use of wheat, other grain or other feed deposited, distributed or scattered by which waterfowl are lured or attracted. Thus in the light of the excellent basic instruction here given, it is submitted that the jury could not have been misled by the one in question which could have been safely omitted. It may be that the trial court was impressed with an over-abundance of caution, or was imbued with a sense of reverence for the learned Opinion of its next higher court of review. Be that as it may, the restatement by the trial judge of this Court's construction of the meaning of the regulations was not reversible error, but was harmless, if any error was committed. None is conceded by the appellee and while the attempt at further clarity may have resulted in some ob-

scurity, yet it is submitted that the jury was given a correct statement of the law as applied to the facts of this case in the overall instructions.

That the instructions must be considered in their entirety is well established.

To this effect:

United States v. Sorcey (C. C. A. 7th), 151 F. 2d 899.

On page 901 appears the following:

"There is no requirement that any specifically framed charge be given if the general charge includes fair, comprehensive instructions upon the subject-matter involved, and in framing a charge upon the elements bearing upon credibility of witnesses, the court is not to be bound to a hard and fast formula as to each and every phase of his charge."

Also, see:

Taylor v. United States (C. C. A. 9th), 142 F. 2d 808, at p. 817; cert. den., 323 U. S. 723.

To the same effect:

Hargreaves v. United States (C. C. A. 9th), 75 F. 2d 68, at p. 73; cert. den., 295 U. S. 759.

"It is a well-settled principle of law that in determining the correctness of instructions, detached phrases and sentences cannot be singled out and considered alone, but must be construed with their context. Colt v. U. S., 190 F. 305, 308 (C. C. A. 8); Michael v. U. S., 7 F. (2d) 865, 866 (C. C. A. 7)."

The rule with respect to instructions is well announced in a rather recent case, namely:

Pine v. United States (C. C. A. 5th), 135 F. 2d 353, at p. 355; cert. den., 320 U. S. 740.

"When we turn to the refused requests to charge, we must keep in mind that they are not to be considered abstractly or *in vacuo* as though the court had given no charge at all. They must be considered in their relation to the trial as a whole and especially in the light of the very full and fair general charge given, to which no exception was taken. In short, the refusal as to any of them may be regarded as reversible error if, but only if (1) it is in itself a correct charge; (2) it is not substantially covered in the main charge, and (3) it is on such a vital point in the case that the failure to give it deprived defendant of a defense or seriously impaired its effective presentation."

Even if error occurs in part of the instruction, such error is not reversible, if it is cured by a subsequent charge or by a consideration of the entire charge.

To this effect:

Clarke v. United States (C. C. A. 9th), 132 F. 2d 538; cert. den., 318 U. S. 789.

The rule is also well settled that when the evidence as a whole is convincing toward the defendant's guilt, reversible error does not necessarily occur from an erroneous instruction; to this effect:

Roubay v. United States (C. C. A. 9th), 115 F. 2d 49.

A *narcotic* case of this Circuit, which has been frequently quoted in other opinions and which discusses these general principles pertaining to sufficiency of instructions and the refusal to give certain specifically requested ones as not constituting error, is that of

Mullaney v. United States (C. C. A. 9th), 82 F. 2d 638, at pp. 642 and 643.

It is submitted that the above authorities when dealing with the specific subject matters appellants now complain of, such as entrapment, refusal to instruct thereon, and the giving of Instruction 19A, clearly indicate that no reversible error was committed. This contention is especially true in view of the strong proof of the guilt of the appellants, the admissions made, and the settled rule that credibility is a matter solely for the jury's determination.

Conclusion.

It is respectfully submitted that there was substantial evidence indicating the guilt of the appellants. There was sufficient, in fact, considerable evidence pointing to the guilty knowledge upon the part of appellants. However, lack of knowledge of the existence of grain or other feed in the shooting area is no defense since under the law and regulations given, hunters shoot at their peril. The appellant Carty had been warned the year before by a Federal Warden concerning the shooting over baited ponds. Another appellant, Maxwell, after his arrest, admitted to one of the wardens that there was some feed and grain scattered over the area in question. Although there was some conflict of evidence as to the amount of grain and other feed there, the jury, by its verdict, resolved that question of fact against the appellants.

The instructions, when viewed in their entirety, were fair, proper, and in accordance with the law.

In view of the presence of substantial evidence establishing the guilt of the appellants, it is submitted that no errors prejudicial to the appellants were committed in the District Court.

The issue of entrapment was not submitted to the jury and the trial court found there was no possible defense of entrapment here as a matter of law. The appellants were not entitled to an instruction on entrapment after a review of the evidence in this case.

In view of the foregoing, it is respectfully submitted that the verdict and judgment as to all the appellants should be affirmed.

Respectfully submitted,

ERNEST A. TOLIN,
United States Attorney;

WALTER S. BINNS,
Chief Assistant U. S. Attorney;

HERSCHEL E. CHAMPLIN,
Assistant U. S. Attorney,

Attorneys for Appellee.

No. 12590

United States
Court of Appeals
for the Ninth Circuit.

EDWIN L. CARTY, H. McCORMICK, EUGENE DOUD, JAMES R. DOUD, VINCENT DOUD, RAYMOND E. FARRELL, JAMES D. McCORMICK, ROBERT MAULHARDT and EDWARD C. MAXWELL,

Appellants.

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeals from the United States District Court, Southern District of California, Central Division.

FILED

OCT - 4 1950

PAUL P. O'BRIEN, CLERK

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

No. 12590

United States
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for the Ninth Circuit.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Los Angeles 12, Calif.

In the United States District Court in and for the Southern District of California, Central Division

No. 21165 CD

UNITED STATES OF AMERICA,

Plaintiff,

vs.

EDWIN L. CARTY, H. M. CORMACK, EUGENE DOUD, JAMES R. DOUD, VINCENT DOUD, RAYMOND E. FARRELL, JAMES D. McCORMICK, ROBERT MAULHARDT, and EDWARD C. MAXWELL,

Defendants.

INFORMATION

(U.S.C., Title 16, Sec. 703, et seq., Migratory Bird Treaty Act, and Sec. 707, Penalty Provision; and the Regulations duly proclaimed thereunder)

The United States Attorney charges:

That on or about October 22, 1949, in Ventura County, California, within the Central Division of the Southern District of California, the defendants, Edwin L. Carty, H. M. Cormack, Eugene Doud, James R. Doud, Vincent Doud, Raymond E. Farrell, James D. McCormick, Robert Maulhardt, and Edward C. Maxwell, without being permitted so to do by any regulation made, adopted, and approved under authority of the Migratory Bird Treaty Act of July 3, 1918, as amended, did take, hunt and kill, migratory waterfowl and migratory game birds over baited ponds and areas, by means, aid and use

of shelled grain, namely, barley and cracked lima beans, which said grain and beans had been deposited, distributed and scattered over said ponds and areas so as to constitute a lure, attraction and enticement to said migratory game birds; contrary to the provisions of the Migratory Bird Treaty Act and the Regulations relating thereto, as duly proclaimed pursuant to law (Regulations relating to migratory birds, approved and proclaimed by the President on July 29, 1948, 13 F. R. 4411, as last amended July 29, 1949, [2] 14 F. R. 4798, Part 1, Chapter 1, Subchapter B, Title 50, Code of Federal Regulations).

ERNEST A. TOLIN,
United States Attorney.

/s/ NORMAN W. NEUKOM,
Assistant United States Attorney, Chief of Criminal Division.

Affidavit of Service by mail attached.

[Endorsed]: Filed February 25, 1950.

At a stated term, to wit: The February Term, A. D. 1950, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, on Tuesday, the 28th day of February, in the year of our Lord one thousand nine hundred and fifty.

Present: The Honorable Harry C. Westover,
District Judge.

[Title of Cause.]

For arraignment and plea; S. L. Johnson, Assistant U. S. Attorney, appearing as counsel for Government; John J. Irwin, Esq., appearing as counsel for all the defendants, who are present on O/R, viz.: Edwin L. Carty, H. McCormick, Eugene Doud, James R. Doud, Vincent Doud, Raymond E. Farrell, James D. McCormick, Robert Maulhardt, and Edward G. Maxwell;

Defendants state their true names are as set forth in Indictment, are informed they are entitled to jury trial and counsel, waive reading of Indictment and enter separate pleas of not guilty as charged.

Court orders that a jury be impaneled and clerk draws names of twelve jurors who take places in the jury box and are examined for cause.

Floyd H. Gelvin is excused for cause by the Court and clerk draws name of Ruth A. Yancey, who is examined and passed for cause.

Victoria M. Kevatiske is excused for cause by the Court and clerk draws name of Clarissa J. Wright, who is examined and excused for cause by the Court. Clerk draws name of Helen E. Magnuson, who is examined and passed for cause.

There being no further peremptory challenges by either side, the jurors now in the box are accepted by both sides and sworn as the jury for this trial, viz.: [5]

The Jury

1. Faith C. Moody	7. Harry Eisenman
2. Ruth A. Yancy	8. Jos. R. Blackstock
3. Irving Perper	9. Cassie Wilson
4. June R. Warton	10. Ruth Meugle
5. Max Lewin	11. Helen Magnuson
6. Kenneth T. Vann	12. Harriet Matlock

Court orders that the prospective petit jurors present who were not impaneled for this trial are excused until notified.

Attorney Johnson makes opening statement to the jury for Government.

Attorney Irwin declines opening statement at this time and defers it until the close of the Government's case.

Jack E. Bedwell is called, sworn, and testifies for Government. Government Ex. 1 to 9, incl., are admitted in evidence.

At 11:25 a.m. Court admonishes the jury not to discuss this cause and declares a recess to 2 p.m. At 2:25 p.m. court reconvenes herein and all being present as before, including all nine defendants, counsel for both sides, and the jury, Court orders trial proceed.

Witness Bedwell resumes the stand and testifies further for Government. Defendants' Ex. A is admitted in evidence.

At 3:50 p.m. Court reminds the jury of the admonition heretofore given, not to discuss this cause, and declares a recess in this trial to 10 a.m., March 1, 1950. [6]

At a stated term, to wit: The February Term, A. D. 1950, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, on Thursday, the 2nd day of March, in the year of our Lord one thousand nine hundred and fifty.

Present: The Honorable Harry C. Westover,
District Judge.

[Title of Cause.]

For further jury trial; S. L. Johnson, Assistant U. S. Attorney, appearing as counsel for Government; John J. Irwin, Esq., appearing as counsel for all nine defendants, who are present on O/R, viz.: Edwin L. Carty, H. McCormack, Eugene Doud, James R. Doud, Vincent Doud, Raymond E. Farrell, James D. McCormick, Robert Maulhardt, and Edward C. Maxwell; and the jury being present, Court orders trial proceed.

Witness Edgerton resumes the stand and testifies on cross-examination.

R. E. Bedwell is called, sworn, and testifies for Government. Defendants' Ex. C is offered and admitted in evidence.

Edmund White, Dell A. Reeder, and Jesse F. Thompson, respectively, are called, sworn, and testify for Government.

At 11 a.m. Court admonishes the jury not to discuss this cause and declares a recess. Court reconvenes herein and all being present as before, including counsel for both sides, and the jury; Government rests.

Attorney Irwin moves the Court for an instructed verdict of not guilty and the Court denies the said motion.

Chas. F. Blackstock, Wm. P. Clark, and Edward C. Maxwell, respectively, are called, sworn, and testify for defendants.

At noon Court admonishes the jury not to discuss this cause and declares a recess in this trial to 2 p.m. today.

At 2 p.m. court reconvenes herein and all being present as before, including counsel for both sides, all nine defendants, and the jury; Court orders trial proceed. [7]

Ed. W. Henke and George E. Gruell, respectively, are called, sworn, and testify for Government out of order, counsel for defense consenting thereto.

Virgil Nover is called, sworn, and testifies for defendants.

Defendant Maxwell resumes the stand and testifies further for defendants. Defendants' Ex. D, E, F, and G are admitted in evidence.

At 2:55 p.m. Court admonishes the jury and declares a recess.

At 3:12 p.m. Court reconvenes herein and all being present as before, including all nine defendants, counsel for both sides, and the jury, Court orders trial proceed.

Lewis Drepeau, Justice of the District Court of Appeals, State of California, and Eugene W. Biscailuz, Sheriff of Los Angeles County, respectively, are called, sworn, and testify for defendants.

Defendant Maxwell resumes the stand and testifies further on cross-examination.

Roswell C. Welch and Carlos Gitman, respectively, are called, sworn, and testify for defendants.

At 3:55 p.m. Court admonishes the jury not to discuss this cause and declares a recess in this trial to 10 a.m., March 3, 1950. [8]

At a stated term, to wit: The February Term, A.D. 1950, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, on Thursday, the 9th day of March, in the year of our Lord one thousand nine hundred and fifty.

Present: The Honorable Harry C. Westover,
District Judge.

[Title of Cause.]

For further jury trial; S. L. Johnson, Assistant U. S. Attorney, appearing as counsel for Government; John J. Irwin, Esq., appearing as counsel for all nine defendants, who are present on bond, viz.: Edwin L. Carty, H. McCormick, Eugene Doud, James R. Doud, Vincent Doud, Raymond E. Farrell, James D. McCormick, Robert Maulhardt, and Edward G. Maxwell; and the jury being present;

The Court inquires of the jury if it has reached a verdict, to which the Foreman of the jury replies in the negative, and requests another hour for further deliberation; whereupon,

The Court orders that the jury return to the jury room for further deliberation. At 3:43 p.m. court reconvenes herein, and all being present as before, including all nine defendants, counsel for both sides, and the jury;

The Court inquires if the jury has reached a verdict, to which the Foreman of the jury replies in the affirmative and presents a verdict as to each of the nine defendants. The said verdicts are read in open court by the clerk of the Court, and each juror being thereupon polled, replies in the affirmative.

Said verdicts are read in open court and ordered filed and entered in minutes, to wit:

* * *

The Court orders cause continued to March 20, 1950, 2 p.m., for sentence of each defendant.

On stipulation of counsel it is ordered that proceedings showing name of defendant H. W. Cormack be changed to read H. McCormick. [9]

[Title of District Court and Cause.]

VERDICT

We, the Jury in the above-entitled cause, find the defendant, Edwin L. Carty, guilty as charged in the Indictment.

Dated: Los Angeles, California, March 9, 1950.

/s/ IRVING PERPER,
Foreman of the Jury.

[Endorsed]: Filed March 9, 1950. [10]

[Title of District Court and Cause.]

VERDICT

We, the Jury in the above-entitled cause, find the defendant, Eugene Doud, guilty as charged in the Indictment.

Dated: Los Angeles, California, March 9, 1950.

/s/ IRVING PERPER,
Foreman of the Jury.

[Endorsed]: Filed March 9, 1950. [11]

[Title of District Court and Cause.]

VERDICT

We, the Jury in the above-entitled cause, find the defendant, Edward C. Maxwell, guilty as charged in the Indictment.

Dated: Los Angeles, California, March 9, 1950.

/s/ IRVING PERPER,
Foreman of the Jury.

[Endorsed]: Filed March 9, 1950. [12]

[Title of District Court and Cause.]

VERDICT

We, the Jury in the above-entitled cause, find the defendant, James R. Doud, guilty as charged in the Indictment.

Dated: Los Angeles, California, March 9, 1950.

/s/ IRVING PERPER,
Foreman of the Jury.

[Endorsed]: Filed March 9, 1950. [13]

[Title of District Court and Cause.]

VERDICT

We, the Jury in the above-entitled cause, find the defendant, James D. McCormick, guilty as charged in the Indictment.

Dated: Los Angeles, California, March 9, 1950.

/s/ IRVING PERPER,
Foreman of the Jury.

[Endorsed]: Filed March 9, 1950. [14]

[Title of District Court and Cause.]

VERDICT

We, the Jury in the above-entitled cause, find the defendant, Vincent Doud, guilty as charged in the Indictment.

Dated: Los Angeles, California, March 9, 1950.

/s/ IRVING PERPER,
Foreman of the Jury.

[Endorsed]: Filed March 9, 1950. [15]

[Title of District Court and Cause.]

VERDICT

We, the Jury in the above-entitled cause, find the defendant, H. M. Cormack, guilty as charged in the Indictment.

Dated: Los Angeles, California, March 9, 1950.

/s/ IRVING PERPER,
Foreman of the Jury.

[Endorsed]: Filed March 9, 1950.

[Title of District Court and Cause.]

VERDICT

We, the Jury in the above-entitled cause, find the defendant, Raymond E. Farrell, guilty as charged in the Indictment.

Dated: Los Angeles, California, March 9, 1950.

/s/ IRVING PERPER,
Foreman of the Jury.

[Endorsed]: Filed March 9, 1950. [17]

[Title of District Court and Cause.]

VERDICT

We, the Jury in the above-entitled cause, find the defendant, Robert Maulhardt, guilty as charged in the Indictment.

Dated: Los Angeles, California, March 9, 1950.

/s/ IRVING PERPER,
Foreman of the Jury.

[Endorsed]: Filed March 9, 1950. [18]

INSTRUCTIONS GIVEN

Government's Instruction No. 1

(Province of the Court)

Members of the Jury:

You have heard the evidence and the argument.

Now it is the duty of the Court to instruct you as to the law governing the case. It is your duty, as jurors, to follow the law as stated in the instructions of the Court and to apply the law so given to the facts as you find them from the evidence before you. You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole.

Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your sworn duty to base a verdict upon any other view of the law than that given in the instructions of the Court.

Given.

/s/ H. C. W. [20]

Government's Instruction No. 2

(Province of the Jury)
(Information on Accusation)

You have been chosen and sworn as jurors in this case to try the issues of fact presented by the allegations of the information and the denial made by the plea of the accused. You are to perform this duty without bias or prejudice as to any party. The law does not permit jurors to be governed by sympathy, prejudice, or public opinion. The accused and the public expect that you will carefully and impartially consider all the evidence, follow the law as stated by the Court and reach a just verdict, regardless of the consequences.

An information is but a formal method of accus-

ing a defendant of a crime. It is not evidence of any kind against the accused, and does not create any presumption or permit any inference of guilt.

Given.

/s/ H. C. W. [21]

Government's Instruction No. 3

(Direct Evidence)
(Circumstantial Evidence)

There are two types of evidence from which a jury may properly find a defendant guilty of an offense. One is direct evidence—such as the testimony of an eye witness. The other is circumstantial evidence—the proof of a chain of circumstances pointing to the commission of the offense.

As a general rule, the law makes no distinction been direct and circumstantial evidence, but simply requires that, before convicting a defendant, the jury be satisfied of the defendant's guilt beyond a reasonable doubt from all the evidence in the case.

In order to justify a verdict of guilty based in whole or in part upon circumstantial evidence, the facts in the chain of circumstances shown by the evidence must be consistent with the guilt of the accused, and inconsistent with every reasonable supposition of innocence.

If the facts and circumstances shown by the evidence are as consistent with innocence as with guilt, the jury should acquit the accused.

Given.

/s/ H. C. W. [22]

Government's Instruction No. 4

(Evidence, Stipulations, Inferences, Presumptions)

Statements and arguments of counsel are not evidence in the case, unless made as an admission or stipulation of fact. When the attorneys on both sides stipulate or agree as to the existence of a fact, the jury must accept the stipulation as evidence and regard that fact as conclusively proved.

The evidence in the case consists of the sworn testimony of the witnesses, all exhibits which have been received in evidence, all facts which have been admitted or stipulated, and all applicable presumptions stated in these instructions. Any evidence as to which an objection was sustained by the court, and any evidence ordered stricken by the court, must be entirely disregarded.

You are to consider only the evidence in the case. But in your consideration of the evidence you are not limited to the bald statements of the witnesses. On the contrary, you are permitted to draw, from facts which you find have been proved, such inferences as seem justified in the light of your experience.

An inference is a deduction or conclusion which reason and common sense lead the jury to draw from facts which have been proved.

A presumption is an inference which the law requires the jury to make from particular facts, in the absence of convincing evidence to the contrary. A presumption continues in effect until overcome or outweighed by evidence to the contrary; but un-

less so outweighed the jury are bound to find in accordance with the presumption.

Given.

/s/ H. C. W. [23]

Government's Instruction No. 5-A

Relative to the testimony pertaining to the character of the defendants in respect to those traits of character which ordinarily would be involved in the commission of a crime like that charged in this case, I instruct you as follows:

Such evidence is regarded by the law as relevant to the question whether defendant is innocent or guilty of the crime charged, because the jury may, if its judgment so directs, reason that it is improbable that a person of good character in such respects would have conducted himself as alleged. Character evidence of itself may be sufficient to raise a reasonable doubt whether or not defendant is guilty, which doubt otherwise would not exist. Hence you must consider such evidence in connection with all other evidence in the case.

But if, after weighing all the evidence, you are convinced beyond a reasonable doubt that the defendant is guilty of the crime charged against him in the information, your duty will be to find him guilty of that offense, notwithstanding the testimony that he was or is a person of good character.

Caljic, No. 32.

Given.

/s/ H. C. W. [24]

Defendant's Instruction No. ...

The defendants, and each of them, have introduced evidence of their good character. This evidence stands uncontradicted. It is incumbent upon me, therefore, to instruct you as to the rules to be followed in weighing and applying character evidence in reaching a verdict in this case.

The purpose and function of character evidence is to generate in your minds a reasonable doubt, and it is to be considered by you regardless of whether the other evidence in the case is clear or doubtful. Therefore, when you consider, as you must, the character evidence introduced along with all the other evidence in the case, if a reasonable doubt exists as to a defendant's guilt, then, as to such defendant, he, and each of them, is entitled to an acquittal.

Of course, mere proof of good character does not entitle a defendant to an acquittal, but it is equally true that evidence of good character, when considered along with all the other evidence in the case, may be the factor which creates the reasonable doubt which entitles the defendant to an acquittal.

Quick v. U. S.
128 Fed. 2d 832.
Point 7 at 835-836.
Points 8 and 9 at 836.

Given as modified.
/s/ H. C. W. [25]

Government's Instruction No. 7

(Credibility of Accused)

A defendant who wishes to testify, however, is a competent witness; and the defendant's testimony is to be judged in the same way as that of any other witness.

Given.

/s/ H. C. W. [26]

Government's Instruction No. 9

(Opinion Evidence)

The rules of evidence ordinarily do not permit a witness to testify as to his opinions or conclusions. An exception to this rule exists in the case of an expert witness. A witness who by education and experience has become expert in any art, science or profession, may state his opinion as to a matter in which he is versed and which is material to the case, and may also state the reasons for such opinion. You should consider each expert opinion received in evidence in this case and give it such weight as you think it deserves; and you may reject it entirely if you conclude the reasons given in support of the opinion are unsound.

Given.

/s/ H. C. W. [27]

Government's Instruction No. 11

(Court's Questions to Witnesses)

During the course of a trial, I occasionally ask questions of a witness, in order to bring out facts

not then fully covered in the testimony. Do not assume that I hold any opinion on the matters to which my questions related. Remember at all times that you, as jurors, are at liberty to disregard all comments of the Court in arriving at your own findings as to the facts.

Given.

/s/ H. C. W. [28]

Government's Instruction No. 12

(Court's Comments to Counsel)

It is the duty of the Court to admonish an attorney who, out of zeal for his cause, does something which is not in keeping with the rules of evidence or procedure.

You are to draw no inference against the side to whom an admonition of the Court may have been addressed during the trial of this case.

Given.

/s/ H. C. W. [29]

Government's Instruction No. 13

It is charged in the information that on or about October 22, 1949, in Ventura County, California, within the jurisdiction of this Court, the defendants Edwin L. Carty, H. M. Cormack, Eugene Doud, James R. Doud, Vincent Doud, Raymond E. Farrell, James D. McCormick, Robert Maulhardt, and Edward C. Maxwell, without being permitted so to do by any regulation made, adopted, and approved under authority of the Migratory Bird Treaty Act

of July 3, 1918, as amended, July 29, 1949, did take, hunt, and kill migratory waterfowl and migratory game birds over ponds and areas which had been baited by means, aid, and use of shelled grain, namely, barley and cracked lima beans which had been deposited, distributed, and scattered over the ponds and areas so as to constitute a lure, attraction and enticement to said migratory game birds; contrary to the provisions of the Migratory Bird Treaty Act and the Regulations relating thereto as duly proclaimed pursuant to law.

Given.

/s/ H. C. W. [30]

Defendants' Instruction No. ...

You are instructed that the Rules of Criminal Procedure permit the trial of several defendants under one Information as in the instant case. However, each defendant is entitled to your separate and considered verdict, with the law as I have given it to you to be applied to each separate defendant in your deliberations concerning him. It is, therefore, possible that you may agree as to your separate verdicts on each and every defendant. It is also possible that you may agree as to a defendant, or defendants, and disagree as to other defendants in this case.

Given.

/s/ H. C. W. [31]

Government's Instruction No. 14

Section 703 of Title 16, United States Code, provides in part that:

"Unless and except as permitted by regulations made as hereinafter provided in sections 703-710 of this title, it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill, possess," * * * (or) * * * "any migratory bird, * * * included in the terms of the conventions between the United States and Great Britain for the protection of migratory birds concluded August 16, 1916 (39 Stat. 1702), and the United States and the United Mexican States for the protection of migratory birds and game mammals concluded February 7, 1936. * * *"

On July 29, 1948, the President of the United States approved and proclaimed a regulation propounded by the Fish and Wildlife Service of the United States, Department of the Interior, under the authority of the Migratory Bird Treaty Act which I have just read to you. That regulation provides in §6.3, in part, as follows:

"Waterfowl (except for propagating, scientific, or other purposes under permit issued pursuant to §6.8) and mourning doves and white-winged doves are not permitted to be taken, directly or indirectly, by means, aid, or use of shelled, shucked, or unshucked corn, or of wheat or other grain, salt, or other feed that has been so deposited, distributed, or scattered as to constitute for such birds a lure, attraction, or enticement to, on, or over the area where hunters are attempting to take them: Pro-

vided, however, such birds may be taken over properly shocked corn and standing crops of corn, wheat, or other grain or feed, and grains found scattered solely as a result of agricultural harvesting." [32]

Thus, this regulation which I have just read to you has the effect of law, since it was propounded under the authority of the Migratory Bird Act of 1918 as amended.

Section 707 of Title 16, United States Code, provides in part that:

"Any person, association, partnership, or corporation who shall violate any of the provisions of said conventions or sections 703-711 of this title, or who shall violate or fail to comply with any regulation made pursuant to said sections, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be * * *" (punished as the law provides).

Given.

/s/ H. C. W.

Government's Instruction No. 15

Thus, there are two essential elements of the offense charged in the information:

First: The taking, hunting, or killing of migratory game birds;

Second: Over ponds or other hunting areas by means, aid, and use of shelled grain or other feed distributed thereover so as to constitute a lure, attraction and enticement to such birds.

Given.

/s/ H. C. W. [34]

Instruction No. .....

There has been testimony that barley and lima beans were found on the premises. It is admitted that barley is grain. The testimony is conflicting as to the amount of barley found on the Santa Clara Game Preserve. It is for your determination, as to whether it was present in such quantities as to constitute a lure or enticement for the ducks present, which have been estimated variously between 4,000 and 12,000 in number.

As to the lima beans, you must first determine whether, under the terms of the regulations, lima beans are in the category of "other feed" which will lure, entire or attract migratory birds. [35]

Government's Instruction No. 18

You are further instructed that in a case of this sort, it is not necessary for the Government to allege or to prove at trial that a defendant or defendants had knowledge of unlawful baiting over hunting grounds to find him guilty of the offense charged. In such case, guilty knowledge or intent is no part of the issue of the case. In this regard it is required that hunters shall investigate at their peril the conditions surrounding the fields and areas in which they are doing their hunting. Thus, the fact that a particular defendant may claim he did not know the area in which he was hunting was baited as charged in the information may not be considered by you in determining his guilt or innocence of the guilt charged. He was was under a positive duty

to investigate for such conditions before hunting in the area.

United States vs. Schulze, 28 Fed. Supp. 234 (1939).

United States vs. Reese, 27 Fed. Supp. 833 (1939).

Given.

/s/ H. C. W. [36]

Government's Instruction No. 20

You are instructed that hunters have no property right in migratory birds, but only such permissive privileges as governmental authorities decree.

Missouri vs. Holland, 252 U. S. 416, 434.

Brandenburg vs. Doyle, 12 Fed. Supp. 343, 344.

Shouse vs. Moore, 11 Fed. Supp. 784, 787.

Nor is the government's power to protect or regulate the hunting of migratory waterfowl confined to those lands to which it has title.

Bailey vs. Holland, 126 F. (2d) 316, 317.

Given.

/s/ H. C. W. [37]

Government's Instruction No. 21

You are instructed that you need not be concerned whether the particular birds in this case are in fact migratory, that is, whether they have actually ever been anywhere other than California in their native haunts; for once the evidence establishes that the particular birds taken are of the species or type included in the Migratory Bird Treaty and the Con-

gression Act and Regulations in connection therewith, the question of whether those particular birds actually went out of this state or were raised in this state, or whether they came from Canada, or elsewhere, is not in issue. The only issue, then, is whether the defendants hunted or killed the migratory birds as charged in the Information.

United States vs. Lumpkin, 276 Fed. 580.

In this connection testimony has been produced to the effect that the birds taken from defendants by the Enforcement Officers, involved in this case, were of the following types: Sprigs, also known as Pintails, Spoonbill, Greenneck Teals, Redheads, Widgeons, and Cackling Goose.

You are therefore further instructed that as a matter of law all birds of these types are migratory birds within the meaning of the Treaty and the statute and Regulations concerned in this case.

Given.

/s/ H. C. W. [38]

Government's Instruction No. 19a

You are instructed that the regulations concerning the baiting of migratory birds is violated whether the hunters had pursued the indirect method of baiting before the season opened so as to keep the birds in the hunting area to be shot after the season opens, whereupon the hunters may flush them as they walk or punt over the preserves, or by directly

placing the grain or other feeds in front of the blinds or stands during the season.

Cerritos Gun Club vs. Hall, 96 F. (2d) 620, 624 (C.A. 9th 1938).

Furthermore, concerning the provision in the regulation that migratory birds are not permitted to be taken "directly or indirectly" by means of bait, you are instructed that the word "indirectly" equally applies to any luring of the birds by grain or other feed to the hunting area, regardless of whether the grain or other feeds is spread before the bird blinds themselves or is more widely scattered.

Cerritos Gun Club vs. Hall, ibid, 629.

Given.

/s/ H. C. W. [39]

Government's Instruction No. 4a

(Presumption of Innocence, Burden of Proof, Reasonable Doubt)

The law presumes a defendant to be innocent of any crime. This presumption of innocence continues throughout the trial, and has the weight and effect of evidence in favor of the accused. You must consider the evidence in the light of this presumption. The presumption of innocence is sufficient to acquit a defendant, unless the presumption is outweighed by evidence satisfying the jury beyond a reasonable doubt of the defendant's guilt.

A reasonable doubt is a fair doubt based upon reason and common sense and arising from the state of the evidence. It is rarely possible to prove any-

thing to an absolute certainty. Proof beyond a reasonable doubt is established if the evidence is such as you would be willing to rely and act upon in the most important of your own affairs. A defendant is not to be convicted on mere suspicion or conjecture.

A reasonable doubt may arise not only from the evidence produced, but also form a lack of evidence. Since the burden is upon the prosecution to prove the accused guilty beyond a reasonable doubt of every essential element of the crime charged, a defendant has the right to rely upon a failure of the prosecution to establish such proof. A defendant may also rely upon evidence brought out on cross-examination of witnesses for the prosecution. The law does not impose upon a defendant the duty of producing any evidence.

A reasonable doubt exists in any case when, after careful and impartial consideration of all the evidence, the jurors do not feel satisfied to a moral certainty that a defendant is guilty of the charge.

Given.

/s/ H. C. W. [40]

Defendants' Instruction No. ....

You are instructed that the presumption of innocence with which the defendants are at all times clothed is not a mere form to be disregarded by you at pleasure, but that it is an essential substantial part of the law of the land, and binding on you in this case, and it is your duty in this case to give the defendants the full benefit of this presumption

and to acquit the defendants unless the evidence in this case convinces you of their guilt as charged beyond ~~all~~ reasonable doubt.

Given.

/s/ H. C. W. [41]

Instruction No. ....

You, as jurors, are the sole judges of the credibility of the witnesses and the weight their testimony deserves. A witness is presumed to speak the truth. But this presumption may be outweighed by the manner in which the witness testifies, by the character of the testimony given, or by contradictory evidence. You should carefully scrutinize the testimony given, the circumstances under which each witness has testified, and every matter in evidence which tends to indicate whether the witness is worthy of belief. Consider each witness's intelligence, motive and state of mind, and demeanor and manner while on the stand. Consider also any relation each witness may bear to either side of the case; the manner in which each witness might be affected by the verdict; and the extent to which, if at all, each witness is either supported or contradicted by other evidence.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause the jury to discredit such testimony. Two or more persons witnessing an incident or a transaction may see or hear it differently; and innocent misrecollection, like failure of recollection, is not an uncommon experi-

ence. In weighing the effect of a discrepancy, consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error or willful falsehood. If you find the presumption of truthfulness to be outweighed as to any witness, you will give the testimony of that witness such credibility, if any, as you may think it deserves. And if you find that a witness has testified falsely in regard to any part of his testimony, you can, if you choose, disregard the whole of such witness's testimony.

Government's Instruction No. 23

(Verdict as to Accused Only)

You are here to determine the guilt or innocence of the accused from the evidence before you. You are not called upon to return a verdict as to the guilt or innocence of any other person or persons. So if the evidence convinces you beyond a reasonable doubt of the guilt of the accused, you should so find even though you may believe one or more other persons are also guilty.

On the other hand, if any reasonable doubt remains in your minds after impartial consideration of all the evidence, you should acquit the accused.

Given.

/s/ H. C. W. [44]

Government's Instruction No. 24
(Verdict—Jury's Responsibility)

It is proper to add the caution that nothing said in these instructions—nothing in any form of verdict prepared for your convenience—is to suggest or convey in any way or manner any intimation as to what verdict I think you should find. What the verdict shall be is the sole and exclusive duty and responsibility of the jury.

Given.

/s/ H. C. W. [45]

Government's Instruction No. 22

(Punishment)

The punishment provided by law for the offense charged in the information is a matter exclusively within the province of the Court, and is not to be considered by the jury in arriving at an impartial verdict as to the guilt or innocence of the accused.

Given.

[Endorsed]: Filed March 10, 1950. [46]

INSTRUCTIONS REFUSED

Defendants' Instruction No. A

The defendants in this case have raised the defense of entrapment. You are instructed that the first duties of the officers of the law are to prevent, not

to punish, crime. It is not their duty to incite to and create crime for the sole purpose of prosecuting and punishing it. When the criminal design originates, not with the accused, but is conceived in the minds of the government officers, and the accused is by persuasion, deceitful representation, or inducement lured into the commission of a criminal act, the government is estopped by sound public policy from prosecution therefor.

Sorrells vs. United States,
287 U. S. 434, 444, 445

Entrapment is the conception and planning of an offense by an officer, and his procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion, or fraud of the officer.

Sorrells v. United States 287,
U. S. 434, at 454

There is common agreement that where a law officer envisages a crime, plans it, and activates its commission by one not theretofore intending its perpetration, for the sole purpose of obtaining a victim through indictment, conviction and sentence, the consummation of so revolting a plan ought not to be permitted by any self-respecting tribunal.

Sorrells v. United States,
287 U. S. 434, at 454

You are, therefore, instructed that if you have first concluded beyond a reasonable doubt that the defendants have committed the acts alleged in the information, that having so concluded, you are further satisfied that prior to their commission the de-

fendants never conceived any intention of [48] commiting these offenses, or any similar offense, but that the officers of the government incited and by suasion and representations lured them to commit the offenses alleged in order to entrap, arrest, and prosecute the defendants therefor, then these facts are fatal to the prosecution of these offenses, and the defendants, and each of them, are entitled to a verdict of not guilty.

Refused.

/s/ H. C. W. [49]

Defendants' Instruction No. ....

The filing of an information by the United States Attorney is no evidence of guilt. Such filing is the mechanics provided by law for beginning a line of action culminated by a trial before a jury such as we are now having. The burden of proving the allegations set out in the information is not placed by law upon the defendants, the burden of proof is upon the prosecution. Every element of the crime must be established by proof which convinces you to a moral certainty and beyond a reasonable doubt, as I have given it to you.

Out by Consent. [50]

Defendants' Instruction No. ....

You are instructed that each and every fact and circumstance relied upon by the prosecution to establish the guilt of the defendants must be proved

by the evidence beyond all reasonable doubt, and if the jury are not satisfied beyond all reasonable doubts that each such fact and circumstance has been proven, it is your duty to find a verdict of not guilty.

People v. James, 5 Cal. App. 427 at 431.

Refused—Covered. [51]

Defendants' Instruction No. ....

Reasonable doubt is not mere possible doubt, because everything relating to human affairs and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all evidence leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge. The burden of proof is upon the prosecutor. All presumptions of law, independent of evidence, are in favor of innocence, and every person is presumed to be innocent until he is proven guilty. If, upon such proof there is reasonable doubt remaining, the accused is entitled to the benefit of it by acquittal. For it is not sufficient to establish a probability, though a strong one arising from the doctrine of chances, that the fact charged is more likely to be true than the contrary; but the evidence must establish the truth of the fact to a reasonable and moral certainty; a certainty that convinces and directs the understanding and satis-

fies the reason and judgment of those who are bound to act conscientiously upon it.

Commonwealth v. Webster, 5 Cashing 320.

Refused. [52]

Defendants' Instruction No.....

The federal jurisdiction over wild life is predicated upon treaties entered into by and between the United States and Great Britain, and by and between the United States and United Mexican States. These treaties were entered into in 1916 and 1936. Thereafter, Congress empowered the Secretary of the Interior to make proclamations and issue regulations to carry out the intent and purpose of these treaties.

The proclamations and regulations issued by the Secretary pursuant to such authority cover open and closed seasons, bag limit of birds, and circumstances and conditions under which migratory birds may be taken. You are instructed that there is no issue here involved of hunting out of season, or possession over the bag limits established by the Secretary. A portion of the regulations involved are as follows:

"Waterfowl . . . are not permitted to be taken, directly or indirectly, by means, aid, or use of shelled, shucked, or unshucked corn, or of wheat or other grain, salt, or other feed that has been so deposited, distributed, or scattered as to constitute for such birds a lure, attraction, or enticement to, on or

over the area where hunters are attempting to take them . . ."

(Proclamation No. 2616, Regulation 3. Cited in 16 U.S.C.A., 1949 Cumulative Annual Pocket Part, Section 704)

Now, in determining whether or not there was grain present on the property of the Santa Clara Club on which these defendants were hunting on the morning of October 22, 1949, in violation of this regulation, there are certain rules of [53] construction, the propounding of which I feel necessary for your intelligent deliberations. All laws (and regulations (supplied)) should receive sensible construction. General terms should be so limited in their application so as not to lead injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language which would avoid results of this character. The reason of the law in such cases should prevail over its letter.

Sorrells v. United States,
287 U. S. 434, 447, 77 Law Ed. 413, 419
(Taken from the majority opinion of Chief Justice Hughes wherein he quoted verbatim, and with approval, United States v. Kirby, 7 Wall. 483, 19 L. ed. 278)

Covered. [54]

Defendants' Instruction No. ....

The defendants have raised the defense of entrapment. The natural and logical approach to this subject of entrapment must be through the application of the doctrine of estoppel. Individuals, in dealing with each other, are not permitted to assert rights or enforce remedies when their own acts induced another to commit the wrong out of which arose the right sought to be enforced. Estoppel is founded on morality and justice, and especially concerns conscience and equity. Although the government is a sovereign, it is not permitted to adopt means which are condemned by the courts when practiced by its citizens. If the conduct of government agents be unconscionable, if it be intentionally deceptive and designed to induce, and does induce another to do something which he would not have otherwise done, the wrongdoer is not, and should not be, permitted to profit thereby. Sound public policy estops the government from asserting that an act which involves no criminal intent was voluntarily done when it originated in and was caused by the government agents' deception.

O'Brien v. United States,
51 Fed. 2d 674, at 677, 678, 679

If you find, therefore, that the government agents, by their conduct, as appears from the evidence in this case, caused the defendants to do the acts complained of and which from the evidence it appears they would not have otherwise done except for such

conduct, then you are instructed that defendants are entitled to a verdict of not guilty.

O'Brien v. United States, 51 Fed. 2d 674 [55]

[Title of District Court and Cause.]

[U.S.C., Title 16, Sec. 703, et seq., Migratory Bird Treaty Act, and Sec. 707, Penalty Provision; and the Regulations duly proclaimed thereunder.]

ERNEST A. TOLIN,
United States Attorney.

NORMAN W. NEUKOM,
Assistant U. S. Attorney,
Chief of Criminal Division.

SANDER L. JOHNSON,
Assistant U. S. Attorney,

/s/ SANDER L. JOHNSON. [56]

Government's Instruction No. 6

("Accomplice" Witness)

All evidence of a witness who is connected with the commission of the offense charged should likewise be considered with caution and weighed with great care.

Refused. [57]

Government's Instruction No. 8

(Failure of Accused to Deny)

Thus a defendant who elects to go upon the witness stand and testify subjects himself to the same

rules as apply to any other witness; and if he fails to deny or explain acts of an incriminating nature which the evidence of the prosecution tends to establish against him, such failure may be considered by the jury along with all other circumstances in evidence; since the jury may or may not draw the inference that if the defendant could have truthfully denied or explained the incriminating evidence against him, he would have done so.

Refused. [58]

Government's Instruction No. 10

(Court's Comments on Evidence)

The law of the United States permits the judge to comment to the jury on the evidence in the case. Such comments are only expressions of the judge's opinion as to the facts; and the jury may disregard them entirely, since the jurors are the sole judges of the facts.

Refused.

/s/ H. C. W. [59]

Government's Instruction No. 16

In this connection, you are instructed that the word "take" has been defined in section 6.2 of regulations relating to migratory birds propounded by the Fish and Wildlife Service of the United States Department of Interior and proclaimed by the President on July 29, 1948, to mean to hunt, kill, or capture or attempt to hunt, kill, or capture.

Thus, it is not necessary for the Government to have proved the successful killing or capturing of migratory birds by the means alleged in the information. It is sufficient if it has been proved to your satisfaction that the defendants attempted to take such birds by the means alleged in the information, that is, by the use of bait over the hunting area.

See also:

Cochrane v. United States,
92 F. (2d) 623, 627, (C.A. 9th 1938).

Refused.

/s/ H. C. W. [60]

Government's Instruction No. 17

I think it well at this time that, although you are probably already aware of them, the aims and purposes of the Migratory Bird Treaty and the acts and regulations which have followed it be explained to you.

It would seem clear that the fundamental purpose is the protection of migratory birds from destruction in an unequal contest between hunter and bird.

United States v. Olson,
41 Fed. Supp. 433 (1941).

In the Congressional Act itself, it is stated that it is aimed at carrying out the purposes of the convention which adopted the treaty, which are as follows: "saving from indiscriminate slaughter"

and "of insuring the preservation of such migratory birds as are either useful to man or harmless."

Furthermore, as was stated by another Federal Court in a case dealing with the same subject as this:

"Concern for the welfare and protection of our migratory birds is not by any means limited to those whose chief interest in them rests in the sport of hunting and killing them. The object of providing for their protection and preservation reaches far beyond the motive of the huntsmen and the sport of hunting." Gaunt v. Lloyds America of San Antonio, 11 F. Supp. 787.

Refused.

/s/ H. C. W. [61]

Government's Instruction No. 15a

You are instructed that the only issues of this case are as I have just read them to you. If you find that the facts were as charged in the information, then the two issues, or requirements for conviction, have been found and met. You must then assume that the enforcement officers concerned were only doing their duty in every respect and you must not be concerned with any personalities that may have been involved between them and the defendants. We are not concerned here with purely local controversies arising from collateral matters.

Refused. [62]

Government's Instruction No. 21a

(Entrapment)

(Note: In a case of this character, alleging violation of the Migratory Bird Treaty Act, where intent and wilfulness are not elements of the charge, it is respectfully submitted that an instruction pertaining to the law of entrapment is not in point. A review of the cases discussing the subject of entrapment reveals that the defense arises when Government agents induce and originate the criminal intent, design or purpose of a defendant and discussions of the doctrine in all cases have been within the framework of and with respect to the formation of such criminal intent or design. It would seem then, that such cases have no bearing upon the case at hand. However, if the Court feels to the contrary, the following is submitted as a fair and proper instruction.)

You are instructed that where the officers of the law have enticed a person to commit the crime charged and lured him on to its consummation with the purpose of arresting him, the law will not authorize a verdict of guilt.

But if a disposition to violate the law is present, the mere fact that public officers furnished the opportunity to commit the crime is no defense. The Government is not engaged in the business of manufacturing criminals; it has enough to do to prevent the commission of crime. But it often becomes necessary for Government officers and agents to match

their wits against the wits of the man who is deliberately violating the law, or who has violated the law and continues to do so; and in such a case the officers or agents may afford him an opportunity to commit a crime.

Thus, decoys may be used to apprehend and present opportunity to one willing to commit offenses and the officers and agents of the Government as a part of their duty have a perfect right to test persons who they have reasonable ground to believe are engaged in violation of the laws. If a man is engaged and prepared to break the law, the mere fact that employees of the Government put it in his power to break it, or do not at once prevent him from breaking it, and thereby capture him in the very act of breaking the law, does not constitute entrapment and is no defense.

If, however, a man has no disposition to break the law and would not break it except he was induced and persuaded therein by the Government, then that does constitute an entrapment and would be a defense wararnting an [63] acquittal of the crime charged.

See: Sorrels v. United States,
287 U. S. 434, 66 A.L.R. 249.

See also: Capuano v. United States,
9 F. (2d) 41 (C.A. 1st). (Bribery);

Jindra v. United States,
69 F. (2d) 429 at (C.A. 5th). (Narcotics);

Stein v. United States,
166 F. (2d) 851 (C.A. 9th). (Narcotics).

Crim. Law—Key # 37. United States v. Kaiser, 138 F. (2d) 219, cert. den. 320 U. S. 801. [64]

Government's Instruction No. 5

(Credibility of Witnesses, Discrepancies in Testimony)

You, as jurors, are the sole judges of the credibility of the witnesses and the weight their testimony deserves. A witness is presumed to speak the truth. But this presumption may be outweighed by the manner in which the witness testifies, by the character of the testimony given, or by contradictory evidence. You should carefully scrutinize the testimony given, the circumstances under which each witness has testified, and every matter in evidence which tends to indicate whether the witness is worthy of belief. Consider each witness' intelligence, motive and state of mind, and demeanor and manner while on the stand. Consider also any relation each witness may bear to either side of the case; the manner in which each witness might be affected by the verdict; and the extent to which, if at all, each witness is either supported or contradicted by other evidence.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause the jury to discredit such testimony. Two or more persons witness-

ing an incident or a transaction may see or hear it differently; and innocent misrecollection, like failure of recollection, is not an uncommon experience. In weighing the effect of a discrepancy, consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error or wilful falsehood. If you find the presumption of truthfulness to be outweighed as to any witness, you will give the testimony of that witness such credibility, if any, as you may think it deserves.

Not given.

/s/ H. C. W. [65]

Defendants' Instruction No. ....

Also if you find that a witness has testified falsely in regard to any part of his testimony, you can, if you choose, disregard the whole of such witness' testimony.

Out—Consent—At end of 5.

[Endorsed]: Filed March 10, 1950. [66]

[Title of District Court and Cause.]

NOTICE OF MOTION

To the United States of America, and to Ernest A. Tolin, Esq., United States Attorney, and Sander Johnson, Esq., Assistant United States Attorney:

You and Each of You Will Please Take Notice

that the defendants in the above-entitled action will, on the 20th day of March, 1950, at the hour of 2:00 o'clock p.m., in the Courtroom of the Honorable Harry C. Westover, United States District Judge, in the Federal Building at Los Angeles, California, through their attorney John J. Irwin, Esq., move the Honorable Court for a new trial for each and every one of said defendants.

Said motion will be based upon the written motion filed concurrently herewith, the memorandum of points and authorities, records and files in the action, and the affidavit of John J. Irwin.

Dated: At Los Angeles, California, March 14, 1950.

/s/ JOHN J. IRWIN,
Attorney for Defendants.

Receipt of copy acknowledged.

[Endorsed]: Filed March 14, 1950. [67]

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

Come now the defendants Edwin L. Carty, H. McCormick, Eugene Doud, James R. Doud, Vincent Doud, Raymond E. Farrell, James D. McCormick, Robert Maulhardt and Edward C. Maxwell, and through their attorney John J. Irwin, Esq., respectfully move the Honorable Court for an order setting aside the judgment of conviction as to each of them in the above-entitled case, and/or an order

granting each and every defendant a new trial of the offense alleged in the above-entitled action. Said motion is made on the following grounds, to wit:

1. Because the verdict of the jury is contrary to the law and the evidence.

2. That the Honorable Court erred in failing to submit to the jury, as requested by defendants' counsel, the instruction on entrapment, and more particularly, the Honorable Court erred in failing to give defendants' requested instruction "A." [69]

3. That the Honorable Court erred in giving Government's Instruction 19 "a" over defendants' counsel's objection.

4. That under all the circumstances, the Honorable Court erred in refusing to declare a mistrial and discharging the jury when the said jury reported, at approximately 10:30 p.m. on the night of March 8, 1950, that they were unable to agree.

5. That the Honorable Court further erred at the same time and place after the jury had so reported in directing they be locked up for the night and resume deliberations the following day, all over the objection of defendants' counsel.

6. That there is newly discovered evidence which is material to defendants' plea of not guilty, which evidence was not known or available to the defendants or their counsel until after the jury had been instructed and retired.

7. That the United States Attorney, through his Assistant, was guilty of misconduct in that he withheld evidence favorable to the defendants, and

which, if available, was material to the defendants' case.

Wherefore, these defendants pray that the Court set aside the verdict and grant them, and each of them, a new trial on the Information, upon which a verdict of guilty was returned.

Dated: March 14, 1950.

/s/ JOHN J. IRWIN,
Attorney for Defendants. [70]

Memorandum of Points and Authorities

A judge may not use undue influence to command or coerce a verdict of guilty.

Wissel v. United States, 22 Fed. 2d 468.

A new trial may be granted on the grounds of newly discovered evidence.

Rule 33, Federal Rules of Criminal Procedure.
Johnson vs. United States,
32 Fed. 2d 128.

Where the criminal design is conceived in the mind of the Government officers and the accused is, by persuasion, deceitful representation, or inducement, lured into the commission of a criminal act, the Government is estopped by sound public policy from prosecution therefor.

Sorrells v. United States, 287 U. S. 434.

Respectfully submitted,

/s/ JOHN J. IRWIN,
Attorney for Defendants.

[Endorsed]: Filed March 14, 1950. [71]

[Title of District Court and Cause.]

STIPULATION IN RE MOTION FOR NEW TRIAL

It appearing that defendants heretofore filed a Motion For New Trial, and that grounds 6 and 7 were supported by the affidavit of defendants' attorney based upon information relayed to the said defendants' attorney by Sander Johnson, Esq., Assistant United States Attorney;

It further appearing, after the filing of said Motion for New Trial the Assistant United States Attorney was advised that the information conveyed by him to defendants' counsel was incorrect, and immediately thereafter the Assistant United States Attorney advised defense counsel that there was a possibility of error in the information furnished by him to defendants' counsel, and which was the basis of defendants' counsel's affidavit in support of grounds 6 and 7 of defendants' Motion for New Trial. Thereupon it was mutually agreed by and between the Government's counsel and defendants' counsel that they would personally examine [73] the evidence which was and is the subject matter of grounds 6 and 7 of defendants' Motion for New Trial. Following this examination both Government's counsel and defendants' counsel mutually agreed that the information volunteered to defendants' counsel after the jury had retired in the above-entitled matter was the result of incomplete information, and it appears that grounds 6 and 7 of defendants' Motion for New Trial are not well founded.

Accordingly, It Is Stipulated by and between the plaintiff through its attorneys, and the defendants, through their attorney, that grounds 6 and 7 of defendants' Motion for New Trial may be abandoned and stricken without prejudice to the other and remaining grounds in said Motion.

It Is Further Stipulated that the affidavit of defendants' counsel filed in support of said grounds 6 and 7, for Motion for New Trial, may be withdrawn from the files of the United States District Court.

Dated: At Los Angeles, California, this 20th day of March, 1950.

ERNEST A. TOLIN,
United States Attorney.

By /s/ SANDER L. JOHNSON,
Assistant U. S. Attorney.

/s/ JOHN J. IRWIN,
Attorney for Defendants.

Upon reading the foregoing Stipulation, and good cause appearing therefor, It Is Hereby Ordered that grounds 6 and 7 of defendants' Motion for New Trial may be abandoned without prejudice to the remainder of said Motion, and It Is Further Ordered that the affidavit of John J. Irwin, filed in support of grounds 6 and 7 with the Clerk of the Court may be withdrawn and delivered to John J. Irwin, Esq.

/s/ HARRY C. WESTOVER,
U. S. District Judge.

[Endorsed]: Filed March 20, 1950. [74]

At a stated term, to wit: The February Term, A.D. 1950, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday the 20th day of March in the year of our Lord one thousand nine hundred and fifty.

Present: The Honorable Harry C. Westover,
District Judge.

[Title of Cause.]

For hearing on motion of defendant for a new trial, pursuant to notice thereof filed March 14, 1950; S. L. Johnson, Assistant U. S. Attorney, appearing as counsel for Government; John J. Irwin, Esq., appearing as counsel for defendants who are all present on O/R, viz.; Edwin L. Carty, H. McCormick, Eugene Doud, James R. Doud, Vincent Doud, Raymond E. Farrell, James D. McCormick, Robert Maulhardt, and Edward G. Maxwell;

Attorney Irwin makes a statement. Court orders said motion of defendants for a new trial denied, and pronounces judgment upon each of the said nine defendants as follows:

Each defendant is fined $500. and allowed to March 27, 1950, at noon, to pay said fine, to wit: [75]

District Court of the United States for the Southern District of California, Central Division

No. 21165-Criminal

UNITED STATES OF AMERICA,

vs.

EDWIN L. CARTY.

JUDGMENT AND COMMITMENT

On this 20th day of March, 1950, came the attorney for the Government and the defendant appeared in person and by counsel, John J. Irwin, Esq.; and,

It Is Adjudged that the defendant has been convicted upon his plea of not guilty, and a verdict of guilty of the offense of unlawfully hunting migratory waterfowl over baited area in violation of Section 703, Title 16, U. S. Code, as charged in the Information; and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant pay a fine unto the United States of America in the sum of $500.00.

It is further adjudged that on motion of the defendant that he be allowed until March 27th, 1950, 12 noon, in which to pay said fine.

It is ordered that the Clerk deliver a copy of

this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ HARRY C. WESTOVER,
U. S. District Judge.

[Endorsed]: Filed March 20, 1950. [76]

District Court of the United States for the Southern District of California, Central Division

No. 21165-Criminal

UNITED STATES OF AMERICA,

vs.

H. McCORMICK.

JUDGMENT AND COMMITMENT

On this 20th day of March, 1950, came the attorney for the Government and the defendant appeared in person and by counsel, John J. Irwin, Esq.; and,

It Is Adjudged that the defendant has been convicted upon his plea of not guilty, and a verdict of guilty of the offense of unlawfully hunting migratory waterfowl over baited area in violation of Section 703, Title 16, U. S. Code, as charged in the Information; and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant pay a fine unto the United States of America in the sum of $500.00.

It is further adjudged that on motion of the defendant that he be allowed until March 27th, 1950, 12 noon, in which to pay said fine.

It is ordered that the Clerk deliver a copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ HARRY C. WESTOVER,
U. S. District Judge.

[Endorsed]: Filed March 20, 1950. [77]

District Court of the United States for the Southern District of California, Central Division

No. 21165-Criminal

UNITED STATES OF AMERICA,

vs.

EUGENE DOUD.

JUDGMENT AND COMMITMENT

On this 20th day of March, 1950, came the attorney for the Government and the defendant appeared in person and by counsel, John J. Irwin, Esq.; and,

It Is Adjudged that the defendant has been

convicted upon his plea of not guilty, and a verdict of guilty of the offense of unlawfully hunting migratory waterfowl over baited area in violation of Section 703, Title 16, U. S. Code, as charged in the Information; and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant pay a fine unto the United States of America in the sum of $500.00.

It is further adjudged that on motion of the defendant that he be allowed until March 27th, 1950, 12 noon, in which to pay said fine.

It is ordered that the Clerk deliver a copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ HARRY C. WESTOVER,
U. S. District Judge.

[Endorsed]: Filed March 20, 1950. [78]

District Court of the United States for the Southern District of California, Central Division

No. 21165-Criminal

UNITED STATES OF AMERICA,

vs.

JAMES R. DOUD.

JUDGMENT AND COMMITMENT

On this 20th day of March, 1950, came the attorney for the Government and the defendant appeared in person and by counsel, John J. Irwin, Esq.; and,

It Is Adjudged that the defendant has been convicted upon his plea of not guilty, and a verdict of guilty of the offense of unlawfully hunting migratory waterfowl over baited area in violation of Section 703, Title 16, U. S. Code, as charged in the Information; and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant pay a fine unto the United States of America in the sum of $500.00.

It is further adjudged that on motion of the defendant that he be allowed until March 27th, 1950, 12 noon, in which to pay said fine.

It is ordered that the Clerk deliver a copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ HARRY C. WESTOVER,
U. S. District Judge.

[Endorsed]: Filed March 20, 1950. [79]

District Court of the United States for the Southern District of California, Central Division

No. 21165-Criminal

UNITED STATES OF AMERICA,

vs.

VINCENT DOUD.

JUDGMENT AND COMMITMENT

On this 20th day of March, 1950, came the attorney for the Government and the defendant appeared in person and by counsel, John J. Irwin, Esq.; and,

It Is Adjudged that the defendant has been convicted upon his plea of not guilty, and a verdict of guilty of the offense of unlawfully hunting migratory waterfowl over baited area in violation of Section 703, Title 16, U. S. Code, as charged in the Information; and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant pay a fine unto the United States of America in the sum of $500.00.

It is further adjudged that on motion of the defendant that he be allowed until March 27th, 1950, 12 noon, in which to pay said fine.

It is ordered that the Clerk deliver a copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ HARRY C. WESTOVER,
U. S. District Judge.

[Endorsed]: Filed March 20, 1950. [80]

District Court of the United States for the Southern District of California, Central Division

No. 21165-Criminal

UNITED STATES OF AMERICA,

vs.

RAYMOND E. FARRELL.

JUDGMENT AND COMMITMENT

On this 20th day of March, 1950, came the attorney for the Government and the defendant appeared in person and by counsel, John J. Irwin, Esq.; and,

It Is Adjudged that the defendant has been convicted upon his plea of not guilty, and a verdict of guilty of the offense of unlawfully hunting migratory waterfowl over baited area in violation of Section 703, Title 16, U. S. Code, as charged in the Information; and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant pay a fine unto the United States of America in the sum of $500.00.

It is further adjudged that on motion of the defendant that he be allowed until March 27th, 1950, 12 noon, in which to pay said fine.

It is ordered that the Clerk deliver a copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ HARRY C. WESTOVER,
U. S. District Judge.

[Endorsed]: Filed March 20, 1950. [81]

District Court of the United States for the Southern District of California, Central Division

No. 21165-Criminal

UNITED STATES OF AMERICA,

vs.

JAMES D. McCORMICK.

JUDGMENT AND COMMITMENT

On this 20th day of March, 1950, came the attorney for the Government and the defendant appeared in person and by counsel, John J. Irwin, Esq.; and,

It Is Adjudged that the defendant has been convicted upon his plea of not guilty, and a verdict of guilty of the offense of unlawfully hunting migratory waterfowl over baited area in violation of Section 703, Title 16, U. S. Code, as charged in the Information; and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant pay a fine unto the United States of America in the sum of $500.00.

It is further adjudged that on motion of the defendant that he be allowed until March 27th, 1950, 12 noon, in which to pay said fine.

It is ordered that the Clerk deliver a copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ HARRY C. WESTOVER,
U. S. District Judge.

[Endorsed]: Filed March 20, 1950. [82]

District Court of the United States for the Southern District of California, Central Division

No. 21165-Criminal

UNITED STATES OF AMERICA,

vs.

ROBERT MAULHARDT.

JUDGMENT AND COMMITMENT

On this 20th day of March, 1950, came the attorney for the Government and the defendant appeared in person and by counsel, John J. Irwin, Esq.; and,

It Is Adjudged that the defendant has been convicted upon his plea of not guilty, and a verdict of guilty of the offense of unlawfully hunting migratory waterfowl over baited area in violation of Section 703, Title 16, U. S. Code, as charged in the Information; and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient

cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant pay a fine unto the United States of America in the sum of $500.00.

It is further adjudged that on motion of the defendant that he be allowed until March 27th, 1950, 12 noon, in which to pay said fine.

It is ordered that the Clerk deliver a copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ HARRY C. WESTOVER,
U. S. District Judge.

[Endorsed]: Filed March 20, 1950. [83]

District Court of the United States for the Southern District of California, Central Division

No. 21165-Criminal

UNITED STATES OF AMERICA,

vs.

EDWARD G. MAXWELL.

JUDGMENT AND COMMITMENT

On this 20th day of March, 1950, came the attorney for the Government and the defendant ap-

peared in person and by counsel, John J. Irwin, Esq.; and,

It Is Adjudged that the defendant has been convicted upon his plea of not guilty, and a verdict of guilty of the offense of unlawfully hunting migra- of guilty of the offense of unlawfully hunting migratory waterfowl over baited area in violation of Section 703, Title 16, U. S. Code, as charged in the Information; and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant pay a fine unto the United States of America in the sum of $500.00.

It is further adjudged that on motion of the defendant that he be allowed until March 27th, 1950, 12 noon, in which to pay said fine.

It is ordered that the Clerk deliver a copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ HARRY C. WESTOVER,
U. S. District Judge.

[Endorsed]: Filed March 20, 1950. [84]

[Title of District Court and Cause.]

NOTICE OF APPEAL

The names of the appellants are Edwin L. Carty, H. McCormick, Eugene Doud, James R. Doud, Vincent Doud, Raymond E. Farrell, James D. McCormick, Robert Maulhardt and Edward C. Maxwell, and their addresses are care of Edward C. Maxwell, Esq., 326 South A Street, Oxnard, California.

The names and addresses of the attorneys for appellants are Otto Christensen, Esq., 1212 Spring Arcade Building, 541 South Spring Street, Los Angeles 13, California, and John J. Irwin, Esq., 5658 Wilshire Boulevard, Los Angeles 36, California.

The offense for which the defendants were convicted was a violation of Section 703, Title 16 of the United States Code, which makes it an offense to hunt and kill migratory waterfowl and migratory game birds over baited ponds and areas by means, aid, and use of shelled grain and other feed distributed and scattered over said ponds and areas so as to constitute a lure, attraction [85] and entirement to said migratory game birds. A one-count Information, including all of the defendants therein, was filed and pursuant to pleas of not guilty a trial was had before a jury resulting in a conviction of said offense.

The jury returned its verdict of guilty on March 9, 1950; within the time provided defendants filed their Motion For New Trial, which Motion was denied on March 20, 1950, by the Honorable Harry C. Westover, Judge Presiding. Said Honorable Judge immediately thereafter, and on the same date, sen-

tenced each of the defendants above named to pay a fine of $500.00.

The above-named appellants hereby appeal to the United States Circuit Court of Appeals, Ninth Circuit, from the above-stated judgment. Appeal will be based on the grounds set forth in the Motion For New Trial, and particularly on the grounds that:

1. The offense charged in the Information did not constitute a crime;

2. The evidence was insufficient to support the verdict;

3. Errors of law including, (a) The Honorable Trial Court's failure to instruct the jury on entrapment as requested; and (b) The giving of other instructions over defense counsel's objection;

4. That the Court erred in confining the jury over-night after they reported they were unable to agree.

Dated: At Los Angeles, California, this 24th day of March, 1950.

OTTO CHRISTENSEN and
JOHN J. IRWIN,

By /s/ JOHN J. IRWIN,
Attorneys for Appellants.

Receipt of copy acknowledged.

[Endorsed]: Filed March 24, 1950. [86]

[Title of District Court and Cause.]

STAY OF EXECUTION

It appearing to the Court that the defendants Edwin L. Carty, H. McCormick, Eugene Doud, James R. Doud, Vincent Doud, Raymond E. Farrell,

James D. McCormick, Robert Maulhardt and Edward C. Maxwell have appealed from the verdict of guilty and judgment thereafter pronounced, on March 20, 1950, against each of them that they pay a fine of $500.00, the fines totalling in the aggregate the sum of $4500.00;

Now, Therefore, the judgment of the Court entered on March 20, 1950, in the above-entitled matter as against each of the above-named defendants may be and is hereby stayed pending the final determination of the cause on appeal on condition that each defendant deposit in the registry of the District Court the sum of $500.00. Said $500.00 so deposited shall be retained by the Clerk of the Court pending disposition of the appeal. If the judgment of this Court is affirmed, or otherwise becomes final, the said moneys so deposited shall be retained by the Clerk of the Court in full satisfaction of the fines imposed. Should, however, the judgment of this Court be reversed, said moneys so deposited shall be returned to the defendants.

Dated: At Los Angeles, California, this 24th day of March, 1950.

/s/ HUGH HUNTER,
United States District Judge.

Pursuant to Rule 38(a) (3).

Approved as to form.

/s/ SANDER L. JOHNSON,
Assistant U. S. Attorney.

Receipt of copy acknowledged.

[Endorsed]: Filed March 24, 1950. [89]

[Title of District Court and Cause.]

STIPULATION EXTENDING TIME AND ORDER THEREON

It appearing that Otto Christensen, Esq., one of the attorneys for the Appellants, has been absent from the District for an approximate period of three weeks, and

It further appearing that on the 20th day of March, 1950, all of the defendants in the above-entitled matter filed their Notice of Appeal from the judgment of conviction and sentence thereon in the above-entitled cause, and

It further appearing that the time within which to designate the record on appeal and to file the record and docket the appeal will expire on April 30, 1950;

It Is Hereby Stipulated by and between the plaintiff and appellee, through its attorneys Ernest A. Tolin, Esq., United States Attorney, and Sander L. Johnson, Esq., Assistant United States Attorney, and the defendants and appellants, through their attorneys Otto Christensen, Esq., and John J. Irwin, Esq., that all of the defendants and appellants may have thirty (30) days from April 30, 1950, within which to serve and file their designation of record on appeal, and sixty (60) days from April 30, 1950,

within which to file the record and docket the appeal.

Dated: At Los Angeles, California, this ..... day of April, 1950.

ERNEST A. TOLIN,
Assistant United States Attorney,

By /s/ SANDER L. JOHNSON,
Attorneys for Plaintiff and and Appellee.

OTTO CHRISTENSEN and
JOHN J. IRWIN,

By /s/ JOHN J. IRWIN,
Attorneys for Defendants and Appellants.

Order

The Court having read the foregoing stipulation of the attorneys in the above matter, and good cause appearing therefor,

It Is Hereby Ordered that all of the defendants in the above-entitled matter may have thirty (30) days from April 30, 1950, within which to serve and file the designation of record on appeal, and sixty (60) days from April 30, 1950, within which to file the record and docket the appeal in the said cause.

Dated: At Los Angeles, California, this 26th day of April, 1950.

/s/ HUGH HUNTER,
United States District Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed April 27, 1950. [92]

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL

To the Clerk of the United States District Court:

1. Information.
2. Motions, if any, to dismiss information and order of Court therein.
3. Plea of defendants to said information.
4. Such necessary recitation of impanelment of jury to show a jury trial was had.
5. Court Reporter's transcript of all the testimony and proceedings of the trial, Court reporter's transcript of proceedings on the settlement of instructions, and the instructions given and refused.
6. Certification of all exhibits and/or photostatic copies thereof.
7. Order of Court denying motions for acquittal and judgment of dismissal, at the conclusion of the evidence of the prosecution and at the conclusion of all of the evidence in the case. [94]
8. Motions for New Trial, and Arrest of Judgment, and Orders of court thereon.
9. Judgments and Sentences and Reporters' Transcript thereon.
10. Notice of appeal.
11. Designation of Points relied on.

/s/ JOHN J. IRWIN,

/s/ OTTO CHRISTENSEN,
Attorneys for Defendant.

Affidavit of service by mail attached.

[Endorsed]: Filed May 23, 1950. [95]

In the United States District Court, Southern District of California, Central Division

Honorable Harry C. Westover, Judge Presiding.

No. 21165 Crim.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

EDWIN L. CARTY, H. W. McCORMICK, EUGENE DOUD, JAMES R. DOUD, VINCENT DOUD, RAYMOND E. FARRELL, JAMES D. McCORMICK, ROBERT MAULHARDT and EDWARD C. MAXWELL,

Defendants.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California, February 28, 1950

Appearances:

For the Plaintiff:
JAMES A. TOLIN,
United States Attorney; by
SANDER L. JOHNSON,
Assistant United States Attorney.

For the Defendants:
JOHN J. IRWIN,
5658 Wilshire Boulevard,
Los Angeles, California. [96]

JACK E. BEDWELL

called as a witness by and in behalf of the government, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Johnson:

Q. Mr. Bedwell, where do you reside?

A. 60 South Colorama Street, Ventura, California.

Q. What is your occupation?

A. State Fish and Game Warden and Marine Patrol. [5*]

Q. What do you mean by "Marine Patrol"?

A. Marine Patrol, that has to do with the enforcement of our commercial fisheries laws and the enforcement of all fish and game laws applying along the coast.

Q. Are you also a Deputy United States Game Warden? A. I am.

Q. In connection with your official duties as Fish and Game Warden and Marine Patrol, what area do you have?

A. The area that I have been assigned is the Ventura-Santa Barbara County area all along the coast.

Q. Do you know the defendants in this case?

A. I know of a couple of the defendants, yes.

Q. Are you aware of the existence of a club, a hunting club, known as the Santa Clara River Game Preserve? A. I am.

*** Page numbering appearing at top of page of original Reporter's Transcript.**

(Testimony of Jack E. Bedwell.)

Q. Where is that located?

A. It is located about two miles west of the City of Oxnard near the mouth of the Santa Clara River.

Q. When did the hunting season open this last year?

A. The first section of the duck season opened on the 21st day of October at noon.

Q. Did you have occasion on the 21st of October to call at the premises of the Santa Clara River Game Preserve? A. I did.

Q. You stated you are familiar with the [6] premises of the Santa Clara Game Preserve?

A. Yes, sir.

* * *

Q. (By Mr. Johnson): Mr. Bedwell, I hand you a photograph marked Government's Exhibit No. 1 for identification and ask you if that represents the premises of the Santa Clara River Game Preserve, as you know it?

A. That represents the larger portion of the area, excluding the buildings of the property on the northwest corner of the property.

Mr. Johnson: The government offers this in evidence as Government's Exhibit No. 1.

* * *

(The photograph referred to was received in evidence and marked Government's Exhibit No. 1.)

Mr. Johnson: May I pass this to the jury at this time? [7]

* * *

(Testimony of Jack E. Bedwell.)

Q. By Mr. Johnson: Mr. Bedwell, would you say that that, at least in substance, represents the area of the Santa [8] Clara River Game Preserve?

A. I would.

Q. With regard to its layout, including the dikes and roads? A. Yes.

* * *

Q. I have drawn on there or, rather, I put on there some arbitrary designations of my own. I refer to the middle dike and cross dikes Nos. 1, 2, 3, 4, and 5. Those are for my own purposes so we can agree on what we are talking about, not meaning to say those are the proper designations of the roads.

At any rate, you have testified you were on these premises on October 21, 1949. A. I was.

Q. What were the circumstances under which you were present at that time? Go ahead and tell us about it.

A. On the opening day, the season opening at noon, I was in the area of the Santa Clara River Game Preserve and the McGrath Lake area on a pre-season patrol, checking for [9] early shooters——

Q. I am sorry. Could you speak a little louder, Mr. Bedwell.

A. Checking for shooters, early hunters, in that area.

Q. The hunting season opened at what time?

A. It opened at 12:00 noon.

(Testimony of Jack E. Bedwell.)

Q. Go ahead.

A. There were several hunters observed in the blinds in the Santa Clara River Game Preserve. I particularly watched two hunters as they came in on the south dike road and came up to their automobiles. They were both observed carrying ducks and they were checked. Their licenses and the duck stamps were in order.

I returned to the Gonzales Road area, which is another road that parallels that south dike road, and observed from that position the duck club. With the aid of binoculars, I was able to observe two hunters in a blind shooting ducks.

Q. Mr. Bedwell, I don't mean to be interrupting and trying to take you from your train of thought, but perhaps I could amplify what I am trying to get at by asking you this question. Did you visit the premises of the Santa Clara River Game Preserve on more than one occasion, that is, on the 21st? A. I did. [10]

Q. What time was the last occasion you visited there on the 21st?

A. The last occasion I had to visit on the 21st was in the evening.

Q. At about what time?

A. About 6:00 o'clock.

Q. What were the reasons for your visiting it at that time?

A. I had heard the comment made by a hunter, who had come in from the club that afternoon, that there had been a few lima beans left on the road.

(Testimony of Jack E. Bedwell.)

Q. Who is that hunter?

A. That hunter was Mr. James McCormick.

Q. What did you do then?

A. I then radioed the patrol car of Warden Spicer and asked if he could meet me.

Q. Whom did you radio?

A. Warden Spicer.

Q. What is his full name?

A. Warden John Spicer.

Q. Go ahead.

A. I radioed his patrol car and asked him if he could meet me at his convenience. We agreed to meet at the Mound Water Company pump, which is near the mouth of the Santa Clara River. [11]

We met, as agreed, and proceeded to the Santa Clara Game Preserve, and there, night having fallen, with the aid of flashlights, we moved out onto the east road.

Q. Where did you enter the premises of the game preserve or club?

A. We entered from the north, came over to the north road dike, proceeded down the dike to the west dike, from the west dike down through the center of the middle dike, and checked blinds and the dikes of the remainder of the club.

* * *

Q. (By Mr. Johnson): Did you then inspect the premises of the Santa Clara Club?

A. We did.

Q. Who was present at that time?

(Testimony of Jack E. Bedwell.)

A. Warden John Spicer and Warden Leslie Edgerton, and myself.

Q. Was it light or dark? A. It was dark.

Q. What did you find the condition of the club to be at that time?

A. We found, along the tops of the dikes, shucked or threshed whole barley. We did not at that time observe any lima beans. [12]

Q. Can you more particularly describe the areas where you found the barley?

A. Down the middle dike and the south crossings and down on the south edges of dikes 3, 4 and 5.

Q. Cross dikes 3, 4, and 5? A. Yes.

Q. Did you inspect or examine this barley?

A. We did, and took a sample at that time.

Q. Did you take a sample? A. I did.

Q. Could you describe the barley that you found?

A. The barley was whole barley that had been threshed. There were no hulls on the barley.

Q. Could you describe for the court and jury the manner in which it was placed upon the premises, the barley?

A. It had the appearance of having been strewn or scattered, some areas not quite as heavily as others, and in other areas it was thick enough where we had obtained the samples to scoop it up with our hands.

Q. What did you do then?

A. Having taken the sample, we returned to our

(Testimony of Jack E. Bedwell.)

automobile, and Warden Spicer then contacted Captain Fred Hecker, his immediate supervisor, on the alleged violation.

Q. Just tell things that you know of your own knowledge, what you did and saw. [13]

A. We returned to the automobile and returned to our home.

Q. Did you subsequently have occasion to visit the premises of the Santa Clara Game Preserve?

A. We did.

Q. When was that?

A. Approximately 7:00 o'clock the following morning, October 22.

Q. I forgot to ask you. Excuse me for going back a bit. You stated you took a sample of this barley you found on the premises of the club.

A. I did.

Q. What did you do with your sample?

A. I placed it in a glass jar, affixed a sticker or identification to it, and put the date on.

Q. And what? A. And affixed the date.

Q. What did you do with the sample after that?

A. I turned it over to Warden Spicer, and where it is now, I don't know.

Q. You are not sure. You were referring to 7:00 o'clock the following morning, which was the 22nd of October. Will you tell us what occurred at that time, if anything?

A. I met with Mr. A. W. Elder, Warden Leslie Edgerton, Warden John Spicer, and Warden Ernie

(Testimony of Jack E. Bedwell.)

Bedwell [14] at Ventura. We proceeded in each of our vehicles to the Santa Clara Game Preserve.

Q. Did you immediately go the club?

A. We parked our cars at the Santa Clara River Gate, left our cars there, that is our cars, meaning Warden Spicer, Warden Ernie Bedwell, and my car, at that point.

We proceeded on or I proceeded on in Warden Leslie Edgerton's car. Warden Ernie Bedwell, John Spicer, and Mr. Elder proceeded in Mr. Elder's car to a point near the Santa Clara River Game Preserve, parked the car in the willows——

Q. Where are these willows with regard to the club?

A. They would be at the northeast corner, at the right of the east road. In that representation, it would be in the northeast corner of the blackboard.

Q. That would be right in here?

A. Approximately so, yes.

Q. In other words, it was the northeast corner of the club premises? A. Right.

Q. Go ahead and tell us what happened then, if anything.

A. From there, the four of us observed the club area and were able to——

Q. This was about what time, again? [15]

A. It was about 7:00 o'clock in the morning.

Q. Was it light? A. It was.

Q. You say you observed. What did you observe?

A. Through the aid of the binoculars, we were

(Testimony of Jack E. Bedwell.)

able to observe about 10 or 12 hunters. They were moving around from dike to dike and from blinds, going out picking up birds. They were observed shooting and birds falling from the air. Warden Spicer and Mr. Elder then proceeded south on the east road to a point opposite the south road dike.

Q. Were you able to see Mr. Elder and Mr. Spicer driving? A. I was.

Q. Were you able to see them stop at this point on this east road to which you have referred?

A. I did.

Q. And that is the road on the east end of the premises of the club line? A. That is right.

Q. What else did you personally observe?

A. The occupants of the car got out on the right side of the car and had a conversation with a hunter——

Q. Where did they stop their car?

A. At the intersection, right near the south road dike. [16]

Q. That would be here? A. Yes, sir.

Q. You were observing all this yourself?

A. Through the binoculars, yes.

Q. Go ahead and tell us what you observed.

A. I observed the occupants of the car get out and go to the right side and talk with a hunter who had come from the south road dike.

Q. Had you seen this hunter walk up towards the car?

A. The hunter was walking out east on south road dike.

(Testimony of Jack E. Bedwell.)

Q. That would be along here?

A. That is right.

Q. And he met Warden Elder and Warden Spicer at this point? A. He did.

Q. What else did you observe, if anything?

A. It appeared that they had a conversation. The occupants of the car, the two men, got back into the car and drove, continued on south on the east road dike towards Gonzales Road.

Q. Where is Gonzales Road?

A. Gonzales Road would be at right angles to east road.

Q. That would be this road? [17]

A. That's right, and running east and west.

Q. In other words, that is a road running east and west below the premises of the Santa Clara Club?

A. That is a main paved road, yes.

Q. What did you then observe, if anything?

A. I observed the hunter, after the car had pulled away, go out across east road into the field adjacent, which would be the east side of the club area, not on the club itself, and pick up a wounded bird.

Q. Did you see him picking up the bird?

A. I could see the bird being picked up.

Q. Were you using the binoculars?

A. I was.

Q. Go ahead.

A. He then proceeded back to the south road dike and walked west on south road dike.

(Testimony of Jack E. Bedwell.)

Q. That would be this right here?

A. That's right, and came over to what appeared from that angle to be dike No. 4.

Q. That is right here? A. Right.

Q. What did you then observe?

A. I observed that hunter have a conversation, it appeared that he was, with other hunters near the blinds in that area. [18]

Q. Where are these blinds located, if any, on the club? You referred to blinds.

A. They are principally located just north and south of the intersection of those dikes.

Q. You mean the cross dikes?

A. Yes. They are located on the cross dikes north and south and not quite the middle of each numbered dike.

Q. In other words, there is one north and one south of the dike on each crosswalk?

A. Yes.

Q. Go ahead and tell us what you observed. Could you speak up a little louder, please?

A. The hunter that had been observed contacted the two hunters in the blind on dike No. 4. He then moved north on dike No. 4, and it appeared that he was contacting a couple of other hunters near the middle dike that had come up to him at that time on dike No. 4. From there, the car that had pulled away from south road dike was observed——

Q. What car is that?

A. That is Mr. Elder's car.

Q. Go ahead.

(Testimony of Jack E. Bedwell.)

A. Driving west on Gonzales Road. It had turned in apparently to the main entrance of the property near the buildings and was observed parked near the triangular section on the southwest corner of the club. [19]

Q. You mean right in this area there?

A. Right in that area there. I don't know exactly where the car was in that particular area.

Q. Did you see the car drive into the area?

A. The car was observed as it had come to a braking stop. I didn't see it driving, but I saw it coming to a stop.

Q. What else did you observe, if anything?

A. The occupants of the car got out and proceeded.

Q. Could you see who the occupants of the car were?

A. They were Warden Spicer and Mr. Elder.

Q. Did you see them?

A. They were observed and the clothing that they were wearing. They were distinguishable.

Q. You had binoculars? A. Right.

Q. Go ahead.

A. They were observed to get out of their car, and just as they got out of their car, another car traveling west on south road dike was seen to come up near their car.

Q. That would be right along this road here?

A. I don't know whether they were on the road or not. It looked like he was coming toward the car

(Testimony of Jack E. Bedwell.)

either from that road or parked in the same adjacent district.

Q. Go ahead. [20]

A. He pulled up along near Mr. Elder's car, and Warden Spicer was observed going to the back of this car and removing birds.

Q. Could you see what they were he was removing?

A. At that distance I couldn't distinguish. It appeared to be a number of birds. He then placed the birds in Mr. Elder's car, and the occupant of this car got out and Mr. Elder was observed writing.

Q. You could see that from where you were?

A. From where we were. We had not received at that time a pre-arranged signal for us to move, that is, Warden Edgerton and Warden Ernie Bedwell and myself, to come out from the willows towards the club at that time. There were four hunters observed coming east on the middle dike toward the east road. They were walking out of the club area.

Q. That would be this middle dike here?

A. They came from the area around dike 4, moving out on middle dike toward the east road.

Q. That is this road here you refer to?

A. Yes. We then decided, the three of us, that we should proceed south on east road and intercept the four hunters who were coming from the club. The other two wardens and myself, in Warden Edgerton's car, proceeded south on east road to the intersection of middle dike, and the east road.

Q. That is right here? [21]

(Testimony of Jack E. Bedwell.)

A. We parked right there. The four hunters then were right about the middle of the intersection of —middle road dike, between the fifth dike and east road. They were observed carrying their shotguns and ducks.

Q. Did they have any birds?

A. They had ducks they were carrying out of the club.

Q. What did you then do, if anything?

A. I heard the conversation that took place between Mr. Carty and Warden Ernie Bedwell.

Q. You have mentioned Mr. Carty. Was Mr. Carty among this group of hunters?

A. Mr. Carty then, as he came across the middle dike, was identified, or I was able to identify him as Mr. Carty.

Q. You knew Mr. Carty?

A. I knew him. I did not recognize any of the others at that time.

Q. Had you parked the car somewhere in that area?

A. We were parked right near that little gate that is on the middle dike as it comes off of the east side.

Q. What accurred after the hunters came up the middle dike, as you testified?

A. The conversation that I heard——

Q. Was there a conversation?

A. Yes. It was started by Mr. Carty.

Q. What was said during that conversation? [22]

* * *

(Testimony of Jack E. Bedwell.)

The Court: You may go on.

Q. By Mr. Johnson: What did he say?

A. He said, "Well, Ernie, it looks like——"

Q. Who is Ernie, by the way?

A. Ernie Bedwell.

Q. He was with you, along with Edgerton, as I understand it?

A. Yes, he was with us. He said, "Well, Ernie, it looks as though we are honored by the entire patrol force."

Warden Ernie Bedwell's reply was, "Not quite, Ed."

Q. Was there any further conversation?

A. There was.

Q. Go ahead and tell what that was.

A. Mr. Carty then said, "It looks like there is no better time than now to try this matter in court regarding baiting of ponds."

That is all the conversation that I heard at that time.

Q. What did you do then, if anything, you yourself, personally?

A. We waited a time, expecting to receive the pre-arranged signal from Mr. Elder. That not being forthcoming, Warden Edgerton got into his [23] car, drove south on east road, west on Gonzales Road, and drove to the position where Mr. Elder's car was parked.

Q. Did you see him arrive over there?

A. I saw his car pull up and stop.

(Testimony of Jack E. Bedwell.)

Q. What were you doing in the meantime, if anything?

A. Well, the three hunters, that is, the other three hunters, were standing off to one side. Mr. Carty was standing on the other side of the other three hunters, and they apparently were in conversation. There was nothing done at that particular moment. We were awaiting the reply from Warden Elder as to whether we should seize the birds and take the names of the men that were there.

Q. What then occurred, if anything?

A. Warden Edgerton returned and said it was going to be necessary for us to take the birds and to take the name of each man present, which was done.

Q. What did you personally do?

A. I took the names of two of the individuals and made identifying, or identification tags, and placed them on the birds taken from each hunter.

Q. How many birds did you take from these hunters? A. Five birds from Mr. Carty.

Q. Just a moment. Were there four hunters and Mr. Carty, or how many were there?

A. There were three hunters and Mr. Carty. [24]

Q. What did you do then? Go ahead.

A. There were five birds taken from Mr. Carty, and 15 birds taken from the other hunters.

Q. What kind of birds were these?

A. They were identified as——

Q. Who identified them?

(Testimony of Jack E. Bedwell.)

A. Well, a general identification as ducks.

Q. You are familiar with waterfowl that are commonly shot by hunters in the California area?

A. I am.

Q. What kind of birds were they, from your experience?

A. The majority of the birds were sprigs.

Q. What is a sprig?

A. The genus or species, I don't know.

Q. It is a duck, isn't it?

A. It is a duck, yes.

Q. What happened then, if anything?

A. The birds were all tagged and placed in Warden Edgerton's car.

Q. Who placed them there?

A. I and Warden Edgerton placed them in the car, in the back seat of his car. The hunters then got into a black sedan and drove away. Warden Ernie Bedwell and Edgerton and myself got into the —we placed the birds in the car, [25] and we then proceeded west across the middle dike of the club and made a search, or just looked for other birds and for grain.

Q. What did you observe? You say you walked out on this middle dike this way? A. Yes.

Q. How far did you walk? That is going west?

A. Going west.

Q. How far did you walk?

A. We walked to the first intersection, or dike

(Testimony of Jack E. Bedwell.)

5, went south about half way, and came back to the intersection over the middle dike, down dike 4 to the south.

Q. Down this way?

A. Back across to the north, upon dike 4, up to the north, then back to the intersection of dike 4.

Q. Then where did you go from there?

A. Moved west back over to dike 3, and we were looking all in that area.

Q. Did you observe the conditions of those areas where you walked? A. I did.

Q. What were the conditions of those areas?

A. I observed grain. I recognized it as whole barley. It was on the ground and in the pickle weed, or the weed that grows on the top of the dikes.

Q. I think I forgot to ask you to [26] describe the area, the premises themselves. In addition to the dikes, what was there, if anything, on the premises?

A. The club itself consists of——

Q. No. I am talking about within the dikes.

A. Within the dikes? The dikes are there to impound waters on which the birds and ducks——

Q. Was there water between the dikes? Was there water in the ponds created by the dikes, that is?

A. There was water in the ponds, except in pond No. 5, or in that southeast corner, there was some water, but it was not a full pond.

Q. You were describing the condition of the dikes and the cross dikes and middle dike, as you found them? A. Yes.

(Testimony of Jack E. Bedwell.)

Q. Go ahead and tell us that.

A. From there, from dike 3, we proceeded back to dike 4 and south on dike 4 to the south road dike.

Q. That is the south road down here?

A. Yes.

Q. What then occurred, if anything?

A. I was standing right beside Ernie Bedwell, and we both observed what later appeared to be a pile of ducks near the intersection of the south road dike and dike 3.

Q. That would be this one?

A. Right there. There was quite a [27] pile of ducks backed up there.

Q. Did you observe any other people on the premises or close?

A. Warden Spicer and Mr. Elder was in the area of dikes 2 and 3. They were searching, looking in that particular area.

Q. Were there any hunters?

A. The hunters at that time had all left the ponds, or left the blinds.

Q. Had you been able to see where they had gone?

A. All I saw was the four hunters that came out the east end of the middle dike. The other hunters, they apparently had gone out the southwest corner of the club.

Q. What occurred after you got down here to the intersection of south road?

A. We then, or I observed a portion of the south road dike as it is there, running east and west, and

(Testimony of Jack E. Bedwell.)

just before that turn in the southwest corner, a strip of the road was covered with lima beans, threshed lima beans.

Q. That would be where, again?

A. Well, just west of the intersection of dike 3 and south road dike. From there west on that south road, west on that north and south road dike.

Q. Would you describe the condition of that road? You say there were lima beans? [28]

A. There were lima beans on the southwest end of the road and at the intersection of dike 3, and from there east on the south road dike and to dikes 5, 4, 3, there was barley in quantity in various spots along the way. It was not all piled or it was not all scattered. There were several spots that were quite dense.

Q. Did you pick up any of the barley at that time? A. I did not, no.

Q. Can you give any further description of the south road?

A. The south road forms the dike on the south side of the club.

Q. I mean the condition of the south dike as to the lima beans that you stated were on there.

A. The lima beans were quite heavy.

Q. Can you tell us approximately how heavy?

A. It appeared from looking at a flat angle, or an angle from the height of a man, it was paved with lima beans. It had a glossy sheen in the morning sunlight.

Q. Can you give us an estimate as to how thick

(Testimony of Jack E. Bedwell.)

it was? A. I made no estimate, no. [29]

* * *

Q. (By Mr. Johnson): What then occurred, if anything?

A. I, with the use of a kodak, a flash bantam camera, took pictures of the evidence, that is, some of the barley being scooped up, and lima beans, and of the roadway.

Q. Could you describe further the scenes which you photographed? How many pictures did you take? A. I took eight pictures.

Q. What were the scenes which you photographed?

A. One of the roads, of the strip of lima beans on south road dike, another of a spot where the grain was on the edge of south road dike near the intersection of dike 3, and appearing to have been thrown into the water. There were three pictures—two pictures of Mr. Elder taking a sample of barley, and another picture of lima beans, and a picture of the mass group of birds laid out and the wardens standing behind them. The pictures were all taken on one roll of film and the film removed from the camera and turned over to Mr. Elder at that time.

Q. Mr. Bedwell, did you observe anything else on the premises of the club besides the hunters?

A. Except for the grain that was observed along the dikes and the tops of the dikes on 3 and 4, and the lima beans on the roadway.

Q. But there were only hunters and the various other [30] people you have described?

A. Yes.

(Testimony of Jack E. Bedwell.)

Q. Who else was present when these pictures to which you have referred were taken again?

A. Mr. Elder, Warden Spicer, Warden Ernie Bedwell, Warden Les Edgerton, and they appear in the pictures.

* * *

Q. (By Mr. Johnson): Mr. Bedwell, I show you a photograph marked Government's Exhibit No. 2 for identification, and ask you if that substantially represents one of the scenes which you photographed on the day and in the manner you have described?

A. That was. [31]

* * *

Q. What particular area does this represent, this scene represent, of the premises of the club?

* * *

A. That scene represents the corner of the intersection of dike No. 4 and south road dike.

Q. That was taken with this camera to which you have referred, and at what time of the day, approximately?

A. Well, it was after 8:00 o'clock. The exact minute, I don't know.

Q. What is depicted there represents the conditions as you saw them at that time? A. Yes.

* * *

(The photograph referred to was received in evidence and marked Government's Exhibit No. 2.)

(Testimony of Jack E. Bedwell.)

Q. (By Mr. Johnson): Now, Mr. Bedwell, I show you a photograph marked Government's Exhibit No. 3 for identification, and ask you if that substantially represents the scene [32] which you photographed with your camera on the occasion and under the circumstances which you have described?

A. That does.

Q. Where was that particular photograph taken with reference to the diagram?

A. That was taken at the intersection of dike No. 3 and south road dike.

Q. And this represents substantially the conditions as you saw them at the time you took the photograph? A. That does.

Mr. Johnson: The government offers No. 3 for identification in evidence, your Honor.

The Court: It may be received.

(The photograph referred to was received in evidence and marked Government's Exhibit No. 3.)

Q. (By Mr. Johnson): Mr. Bedwell, I show you a photograph marked Government's Exhibit No. 4 for identification, and ask you if that substantially represents a scene which you photographed on the day to which you have referred and under the circumstances which you have described?

A. That does.

Q. Can you tell us where that scene was photographed from, if you know?

A. That picture was taken near the intersection of dike No. 4 and south road dike, approximately 10

(Testimony of Jack E. Bedwell.)

—between [33] 8 and 10 feet from the intersection of that corner, taken across a portion of the pond.

* * *

(The photograph referred to was received in evidence and marked Government's Exhibit No. 4.)

Q. (By Mr. Johnson): I show you a photograph marked Government's Exhibit No. 5 for identification, and ask you if that substantially represents a scene which you photographed under the circumstances to which you have testified?

A. That does.

Q. Who is that in the picture?

A. That is Mr. A. W. Elder.

Q. Where is that picture taken from, what area, if you know?

A. It was taken between dike No. 3 and dike No. 2 on south road, in the lima beans on the dike.

Mr. Johnson: The government offers Exhibit No. 5 in evidence.

The Court: It may be received.

(The photograph referred to was received in evidence and marked Government's Exhibit No. 5.) [34]

Q. (By Mr. Johnson): Mr. Bedwell, I also show you a photograph marked Government's Exhibit No. 6 for identification, and ask you if that substantially represents a scene which you photographed under the circumstances and on the day to which you testified? A. That does.

(Testimony of Jack E. Bedwell.)

Q. Where was that particular photograph taken, if you know?

A. It was taken approximately 10 feet west of dike No. 3 and south road dike. It shows the intersection of the dike and the lima beans.

* * *

(The photograph referred to was received in evidence and marked Government's Exhibit No. 6.)

Q. (By Mr. Johnson): I show you a photograph marked Government's Exhibit No. 7 for identification, and ask you if that substantially represents a scene which you photographed under the circumstances and on the date to which you have testified?

A. It does.

Q. Where was that particular photograph taken, if you know?

A. That was taken near the intersection of dike 3 and [35] the south road dike on the lima beans.

Q. Who is the man pictured in there?

A. That is Mr. A. W. Elder.

* * *

(The photograph referred to was received in evidence and marked Government's Exhibit No. 7.)

Q. (By Mr. Johnson): Mr. Bedwell, I show you a photograph marked Government's Exhibit No. 8 for identification, and ask you if that substantially represents a scene photographed by you under the

(Testimony of Jack E. Bedwell.)

circumstances and on the date to which you have testified? A. It does.

Q. Where was this particular photograph taken, if you know?

A. It was taken looking west from dike No. 3 down the road west, showing the lima beans and our parked vehicle.

* * *

(The photograph referred to was received in evidence and marked Government's Exhibit No. 8.) [36]

Q. (By Mr. Johnson): Mr. Bedwell, I further show you a photograph marked Government's Exhibit No. 9 for identification, and ask you if that substantially represents a scene which you photographed under the circumstances to which you have teestified and on that date? A. It does.

Q. Where was this particular picture taken, if you know?

A. At the spot where the birds were piled at the intersection of dike No. 3 and south road dike.

* * *

(The photograph referred to was received in evidence and marked Government's Exhibit No. 9.) [37]

Q. (By Mr. Johnson): Mr. Bedwell, you testified this morning that at the time you and Warden A. E. Bedwell and Warden Edgerton left the clump of

(Testimony of Jack E. Bedwell.)

bushes and approached the middle dike down the east side, that is the middle dike, of the Santa Clara River Club, you saw four hunters coming out. Have you thought that over during the noon hour?

A. Yes, I did.

Q. Do you wish to make a statement in that connection? [39]

A. I would like to. At that time there were four hunters and the man whom we identified as Mr. Carty.

Q. So that there was a total of five there?

A. There was a total of five that came off of the middle dike to the east road.

Q. You now wish to correct your testimony accordingly? A. Yes.

Q. That you. Now, Mr. Bedwell, referring to the pictures which were introduced in evidence this morning, and most particularly to Government's Exhibit No. 2 in evidence, I notice that there appears to be a lot of material on the ground there. Could you tell the court and jury what that material was at the time you photographed this scene?

A. That was what I call whole barley, barley that had been threshed.

Q. This particular portion here, what is that? Is that a road, or what is it?

A. That is the intersection of dike 3, it appears —dike 4 and the south road dike.

Q. Dike 4 and the south road dike?

A. Yes.

(Testimony of Jack E. Bedwell.)

Q. Could you tell us what this is over here, this clump that appears to be bushes or something?

A. That appears to be the edge of the pond bordered by dike 4 and the south road, and showing a portion of the [40] impounded water.

Q. Could you see any barley or other material out in that area?

A. It was all along through the pickle weed.

Q. That is what you call pickle weed?

A. Yes.

Q. And grass? A. Yes.

Q. Did you notice any other material besides barley, or is there any other material besides barley that we can see in this picture?

A. Not in that spot, no.

Q. In other words, as you recall, that is just barley?

A. That is right. It looks just as it was there, just barley.

* * *

Q. (By Mr. Johnson): Now, Mr. Bedwell, referring to Government's Exhibit No. 3 in evidence, again we appear to have something like a road running along here, and then something running along again up there. Can you tell me what that is along there, along the bottom?

A. That is a portion of the south road dike near dike 3. [41]

Q. This is dike 3 here? A. Yes, it is.

Q. And what is the material that is mixed on the ground in this exhibit?

(Testimony of Jack E. Bedwell.)

A. That is both lima beans and barley.

Q. There are both lima beans and barley there?

A. Yes.

Q. Or there were at the time?

A. There were both lima beans and barley at the time.

Q. I note, also, on the picture there are several birds that look like ducks. What birds were those?

A. Predominantly, they were sprigs. On the right of the picture, there is one small goose.

Q. Would that be the one on the extreme right?

A. Of the picture, yes.

Q. That is the one goose that was taken?

A. There was one goose taken.

Q. What kind of a goose was it?

A. That one, I believe, was a cackling goose, a variety.

Q. From whom were these birds taken, if you know?

A. They were taken from all of the hunters that were on the gun club at the time.

Q. And that included the defendants in this [42] case? A. That included the defendants, yes.

Q. Who is the man first pictured right here?

A. That is Warden R. E. Bedwell.

Q. He is the one who accompanied you down from the clump of bushes onto the premises of the hunting club? A. That is right.

Q. Who is that man?

A. That is Agent Elder.

(Testimony of Jack E. Bedwell.)

Q. And the man sitting here?

A. He is in the court room.

Q. This man here (indicating)?

A. That is Warden Leslie Edgerton.

Q. He is also a State Game Warden and Deputy Federal Warden? A. Yes.

Q. And the gentleman on the extreme right?

A. That is Warden John Spicer, who is also a State Warden and Deputy United States Warden.

Q. There is a piece running along more or less the top of the picture, and it looks as though there was water on the other side. What is that piece that runs along the top there?

A. That is the representation of the middle dike that runs through the middle of the club. [43]

* * *

Q. (By Mr. Johnson): Now, Mr. Bedwell, referring to Government's Exhibit No. 4, I think it is properly placed this way, is it not?

A. That is right.

Q. With the number "4," which the clerk has placed on it in the upper right-hand corner?

A. That is correct.

Q. What does that scene represent from the standpoint of the area and conditions, as you recall them?

A. That is a picture taken near the intersection of dike 3 and south road dike and is a picture of what appeared to be a large quantity of barley thrown from the bank into the water. The white

(Testimony of Jack E. Bedwell.)

spots in the water are the whole barley under the surface of the water.

Q. Were there any lima beans in this particular area?

A. Not in that exact spot. On the dike itself, there were lima beans, but not there.

Q. In the area included in the picture?

A. Not in the picture. [44]

* * *

Q. (By Mr. Johnson): Going further and again referring to one of the government's exhibits in evidence, No. 5, I think that I can recognize that as Mr. Elder. We have already identified him in a previous picture. That is Agent Elder there, is it?

A. That is Agent Elder, yes.

Q. What is he doing in the picture?

A. He didn't know at the time I was taking this picture.

Q. This is an impromptu picture?

A. That is correct. He is taking a sample in an aluminum cup of barley and cracked lima beans.

Q. In that particular area pictured here in this photograph, were there both lima beans and barley?

A. There was.

Q. Are there any in this area in the back part?

A. Not at that immediate vicinity, not at that picture, no.

Q. Would you tell the court and jury again just where this particular area is in relation to the premises of the Santa Clara Hunting Club?

A. Well, in the position that the picture was

(Testimony of Jack E. Bedwell.)

taken in this photograph, it is between dike 2 and dike 3 on the south road. [45]

* * *

Q. (By Mr. Johnson): Now, referring to Government's Exhibit No. 6, Exhibit No. 6 in evidence, again we have Mr. Elder, I believe, is that correct?

A. Yes, that is correct.

Q. What is this area over which he is kneeling down here?

A. The foreground of the picture is a representation of south road dike.

Q. And what is he doing in the pictures, if you recall?

A. He is picking up a hand, both hands full of lima beans and barley.

Q. Were there both lima beans and barley in this particular area?

A. Right in that particular spot, yes.

Q. What is this clump of bushes, etc., running out this way into the water?

A. That is the right angle of the dike No. 3 and the south road dike.

Q. Referring to Government's Exhibit No. 7, Exhibit No. 7 in evidence, again we have Mr. Elder, and he appears to be doing something there. Can you tell the court and jury what that represents? [46]

A. The foreground of the picture is a representation of the south road dike looking across the pond between dike 2 and dike 3, and he is taking a sample of lima beans and barley and placing them

(Testimony of Jack E. Bedwell.)

in a Golden State milk carton.

Q. Golden State?

A. I believe that is the name.

Q. What was the material on the ground in that particular area or at that particular area?

A. Cracked lima beans and barley.

Q. Both were in that particular area?

A. They were, yes.

Q. Is this the middle road dike here, just above the water, the main body of the water?

A. Yes, that represents the middle dike.

Q. The light spot is water on the other side?

A. That would represent the pond on the other side, yes.

Q. Referring to Government's Exhibit No. 8 in evidence, it appears to be a road. Could you describe that particular area, where it is?

A. The roadway that runs across the middle of the picture is the south road dike. That is the road that appears to be paved with the cracked lima beans.

Q. I notice two cars parked on the road there. Whose cars are those? [47]

A. The light car on the left is a car of Warden Les Edgerton. The one on the right is that of Agent Elder.

Q. Now, this appears to be a cross dike over here, is that correct? A. That is right.

Q. What cross dike is that?

A. That cross dike is the dike at dike No. 3.

Q. And this curve here, where the road curves,

(Testimony of Jack E. Bedwell.)

where would that be in regard to this diagram? The road appears to curve back that way.

A. It curves right off behind where the cars are there in the approximate position it is drawn there. It is right near dike 2.

Q. That is the curve on the diagram?

A. On the diagram, yes.

Q. What was that material that is seen strewn along that road in the photograph?

A. Cracked lima beans and some whole lima beans.

Q. Is there any barley in this particular area?

A. Near the foreground of the picture, there was barley. Not down near the automobiles but more on this end of the dike.

Q. Mr. Bedwell, did you see any cattle in the area? A. I did not.

Q. Was there any livestock in the area? [48]

A. There was no livestock of any kind observed.

Q. Did you notice any cattle prints or livestock prints there on the lima beans, footprints?

A. No. There were some automobile tracks.

Q. You can see an automobile track here?

A. Yes.

Q. Now, we come to the last of this series, Government's Exhibit No. 9, and again we have pictured Mr. Elder, I believe, and I think that is Warden Bedwell, R. E. Bedwell, the second man.

A. Yes.

Q. And this is Warden Edgerton, is it not?

A. That is correct.

(Testimony of Jack E. Bedwell.)

Q. Where was this particular picture taken, that is, what does the area represent as to that diagram?

A. It represents the intersection of south road dike, on which the birds are stacked, and dike No. 3.

Q. These are the birds stacked here where you found them when you came on the premises?

A. Some of the birds were stacked there by Warden Spicer and Agent Elder.

Q. What did you do, incidentally, with the birds that you had taken from the five people who were entering upon the east road from the middle dike, as you have testified?

A. They were placed in Warden Edgerton's car at the [49] time that we left the area of the middle dike road and east road.

Q. Did you see what happened to them after they deposited them, after they placed them in the car?

A. After the game preserve had been devoided of hunters, there were no other hunters in the area, the birds that were in Warden Edgerton's car were then placed in Agent Elder's car.

Q. Did you see that?

A. I did. I assisted in carrying the birds.

Q. Did you or did you not yourself write out any slips of paper indicating the violations in regard to those you took?

A. I did not. I wrote only the identifying name of the hunter and the birds were tagged as such previous, not at that time when the birds were placed in the car.

(Testimony of Jack E. Bedwell.)

Q. Of those five hunters whom you encountered coming from middle road dike when you first came upon the premises of this hunting club, how many of the defendants were there, or those who are now defendants in this case?

A. I believe there is two.

Q. And who are they?

A. They are Mr. Carty, and the other person I am not positive of.

Q. Can you identify Mr. Carty? [50]

A. I can.

Q. Where is he?

A. He is sitting at the counsel table.

Q. On which side?

A. He is sitting on my left, on the left side of the table, the man on the right.

Q. On your right? A. On my right, yes.

Q. Do you recognize now the other man you encountered at that time anywhere in the court room?

A. Yes, I do.

Q. Which one is he?

A. Mr. McCormick, or Cormack.

Q. Cormack? A. Yes.

Q. Where is he?

A. He is sitting in the left front row.

* * *

Q. (By Mr. Johnson): Is that Mr. Cormack you refer to?

A. That is the man. I assumed his name was Cormack. I may have gotten the prounciation incorrect.

(Testimony of Jack E. Bedwell.)

Q. But you do recognize him as being in the first row? [51] A. Yes.

Q. How far in from you in the first row?

A. He is the fourth man from the center.

Q. In your opinion or from your own experience as a game warden, would this material which you found on the premises of this private hunting club tend to allure and attract ducks or geese?

A. I believe that it would, yes.

Q. The people whom you observed hunting ducks as you came upon the premises, were they carrying guns? A. Yes.

Q. Was Mr. McCormick carrying a gun?

A. He was.

Q. And Mr. Carty? A. Yes.

Q. Where were the defendants while you were taking these pictures, which have been introduced in evidence as Exhibits 2 through 9? Were they present?

A. There were no hunters or anyone in the area, except the wardens who were present.

Q. How soon after they left were the pictures taken?

A. They were taken practically—well, after making the search of the area, the dikes and the lines, probably a half an hour, three-quarters of an hour after the defendants had—or after the hunters had left the game preserve. [52]

Q. I should have asked this earlier. When you first observed the premises from the clump of willows, did you see any waterfowl in the area?

A. Yes, I did.

(Testimony of Jack E. Bedwell.)

Q. Where were they?

A. They were in the ponds of the club itself.

Q. Did you subsequently have occasion on the same day to visit the Santa Clara Hunting Club?

A. Yes, I did.

Q. What time was that?

A. It was after lunch, some time around 1:00, 1:30, when I returned to the game preserve.

Q. What were the circumstances of that visit? Will you tell that to the court and jury, please?

A. We were returning back to get our automobiles.

Q. Who were "we"?

A. Warden John Spicer and Agent Elder were bringing—I am sorry. Warden Ernie Bedwell and Agent Elder and myself were in Agent Elder's car, and he was bringing us back to our automobiles, which were parked in the river bottom.

Q. Where you left them during the morning?

A. That's right, where we had parked them earlier in the day.

Q. Go ahead.

A. On approaching the Santa Clara game preserve from [53] east road, we observed two hunters, three hunters in the field, in the marsh or in the area of the club. They were observed to have shot——

Q. Will you speak a little louder, please?

A. They were observed to have fired one shot at a bird who was seen to fall. On parking the car at the intersection of middle road and east road, we three than proceeded west on the middle dike out

(Testimony of Jack E. Bedwell.)

to where the hunters were in the blinds.

Q. Where were these blinds located?

A. At the time they had started to move, apparently to pick up their bird, and they were nearer dike No. 3 and on the south portion of dike No. 3, that is south from the middle dike, and in that area, and Agent Elder talked to these hunters.

Q. What did he say?

A. I don't know. I was not present at the time.

Q. You were present there, weren't you?

A. In the area, but I did not hear what was being said.

Q. Go ahead and tell us what then occurred?

A. Warden Bedwell and myself, Ernie Bedwell, walked around dike 3 and up around dike 2, and in that immediate area, and returned as Agent Elder was completing the writing of what appeared to be violation slips for these two hunters.

Q. Did you learn the names of the people at that time? [54]

A. One I recognized the writing as being Mr. Darrell or Mr. Farrell, I believe it was.

Q. You recognized Mr. Farrell?

A. I did not recognize him. I saw the name on the violation slip.

Q. What were the conditions of the premises of the club at that time, if you know?

A. They were the only two hunters present. There was grain on the middle dike and along the dike, between dikes 2 and 3, all along that middle dike, there was whole barley.

(Testimony of Jack E. Bedwell.)

Q. (By Mr. Johnson): Did you hear any conversation at that time?

A. Only the portion that Agent Elder informed the two hunters that the club had been closed, or that the club was to be closed, and they had cited several defendants or several hunters in the morning, and that they were included in the violation, that they had been shooting over the ponds [55] which were baited.

Q. Did you hear any part of the conversation by the people who were cited by Mr. Elder?

A. No, except as we walked away, Ernie Bedwell and I walked toward dike 3, down middle road dike, and this other party, who I didn't know, spoke to——

* * *

Q. Did you hear any conversation by anyone who you are now able to identify, other than Mr. Elder?

A. I am not positive of the identification.

Q. Mr. Bedwell, going back a bit again, if I may, referring to the time when the pictures were taken and the fact that, as you stated, the hunters had already left a short time before the pictures were taken, did any other hunters or automobiles appear in that area during that interim?

A. Yes, there was another car seen to approach the area of the club as we were leaving the club area.

Q. Did they come on to the premises?

(Testimony of Jack E. Bedwell.)

A. I believe that they did, yes.

Q. You didn't speak with them?

A. No, I did not. [56]

Q. You took the pictures before they came on the area? A. Yes.

Q. Have you ever shot in the area of the Santa Clara hunting club? A. I never have.

Q. Is it open to the public, to the best of your knowledge. A. No, it is not.

* * *

Cross Examination

By Mr. Irwin:

Q. Showing you Defendants' Exhibit A for identification, I ask you if you recognize what that is a picture of?

A. That appears to be the area of the Santa Clara Game Preserve.

Q. You are familiar with the reserve, are you not? A. The general area, yes.

Q. By the way, how long have you been a warden in [57] that area, Mr. Bedwell?

A. I have been assigned to the Ventura-Santa Barbara County area for the past two years.

Q. Now, when you refer to the south road, where I have my pointer, is that the south road that has been used in that abbreviated diagram on the blackboard? A. Yes.

Q. Take your time. I don't want to mislead you. I [58] want to get something where we can all

(Testimony of Jack E. Bedwell.)

see the perspective of it.

A. That appears to be the curve of the south road dike.

Q. With your permission, and with the permission of the court here, I have in my hand—can we call this south? A. Yes.

Q. I will put an S here for that. Over here on the opposite side, when we refer to the north side of the premises, where I have my pointer, would that be north in the picture?

A. Relatively north, yes.

Q. I will make a mark indicating north here as the witness has identified it. Then the top of the picture, that would be east, is that correct?

A. The top of the picture would be west.

Q. Pardon me. I will put a W there. The bottom of the picture then would be east, correct?

A. Relatively, yes.

Q. These ridges that you see in the middle of the picture where I have my pointer, and we will identify them by count, the first ridge closest to the west part of the picture, that is a road, is it not?

A. Yes, it is a roadway.

Q. And below that, easterly, there is one, two, three, [59] four, five ridges, and those are dikes running from north to south on the property, is that correct? A. Yes, that is right.

Q. The last visible line running north and south that way is another road? A. Yes.

Q. What was it you called that road?

A. We called that east road, I believe.

(Testimony of Jack E. Bedwell.)

Q. That is east road? A. Yes.

Q. The line running east and west appearing to just bisect these ridges that I have just identified, is that what you call the middle dike road?

A. It is the middle dike.

Q. The middle dike, we call it? A. Yes.

Q. That is in the center of these ridges?

A. Yes, approximately in the center.

Q. It runs from east to west?

A. Yes, approximately.

Q. For the purpose of the enlightenment of us all, would you please tell me, if you can, the distances between these dikes? I have my pointer on what we have identified as the first dike from the west of the property. From that dike to the second ridge easterly, which we have identified as another [60] dike, what is the distance between those two dikes?

A. I didn't measure that.

Q. You made no measurements at all?

A. No, I made no measurements.

Q. Have you any present understanding or knowledge as to what is the total acreage involved in the Santa Clara Game Preserve?

A. No, I haven't any idea.

* * *

(The photograph referred to was received in evidence and marked Defendant's Exhibit A.)

Q. (By Mr. Irwin): Do you have in mind my question of a moment ago? [61]

A. I don't know whether you had completed it or not.

(Testimony of Jack E. Bedwell.)

Q. The question is, where were you? Will you take the pointer and show us?

A. I can't show it exactly, because it doesn't show it here, but the relative position to this photograph would be some place over in this area. The road goes across and turns right and across the cattle yard, and the clump of willows is back in this area.

Q. That is to say, you have taken the pointer at a point opposite the northeast corner of what we have designated as the east road and have placed yourself still north and outside the confines of that picture? A. That is right.

Q. About how far would you say you were from north of the north road here?

A. I would estimate that we were about two-tenths of a mile from where we were in the willows to the fence line or the property line, as I know it. It may not be the true property line but the area where our road goes across the end of the club is about two-tenths of a mile.

Q. In other words, you were about two-tenths of a mile removed from the northeast corner of the intersection of east road and the north road?

A. Approximately that, yes.

Q. It may be helpful for the jury to watch that as we [62] go along in the examination. I believe you stated that on opening day, which was the day previous to the date upon which all of these events have occurred, according to your testimony, that

(Testimony of Jack E. Bedwell.)

the previous day, as I have stated, you were likewise at the Santa Clara Game Preserve?

A. Yes, I was there.

Q. I believe you also stated you had been there prior to the opening of the season?

A. A couple of hours, yes.

Q. You mean a couple of hours before the season opened?

A. Before noon of the day of the 21st.

Q. How long before the 21st had you been there?

A. Only the two hours before.

Q. That is all. Now, on the 21st, how many agents were with you in the immediate area of the Santa Clara Game Preserve on the 21st?

A. On the day of the 21st, prior to the opening of the duck season, which was at noon, I had been there in the company of myself, and Warden R. E. Bedwell of Santa Barbara.

Q. Just the two of you?

A. Just the two of us, yes.

Q. Where were you on the 21st? Let's find out where you were then.

A. There again, the photograph doesn't show Gonzales [63] Road, but it would be at approximately the bottom of the picture and that runs parallel with this east road. Let's get it right here. Gonzales would run along this portion, making a right angle to this east road. In other words, to come into the club, you come in Gonzales Road, travel west, and drive north into the houses of the club proper.

(Testimony of Jack E. Bedwell.)

My position prior to the opening of the season was again in a spot off of the area that this picture covers, in that it would be in the extreme southwest corner, and, while it doesn't show it, off to the left of the picture is what is known as the McGrath ranch, and it was near the buildings of the McGrath ranch property that Warden R. E. Bedwell and myself were parked.

Q. How long were you parked there?

A. I don't know the exact time. Possibly 30 minutes.

Q. You said you arrived there about two hours before the season opened? A. Yes.

Q. You said you were parked there about 30 minutes. Then where did you go?

A. I remained in the area. Warden R. E. Bedwell drove out Gonzales Road, and when he left, he stated that he was going to the McGrath lake area.

Q. So then you remained alone. Are you still off the [64] picture on Gonzales Road?

A. I am back over in this southwest corner of the area.

Q. Did you stay there or did you go someplace else?

A. No. I remained in that particular area.

Q. Until when?

A. Well, until the shooting started on the club at 12:00 noon.

Q. Did you move at any time?

A. I did after the shooting started. I moved

(Testimony of Jack E. Bedwell.)

down into the road that goes into the club.

Q. Very well. Can you place yourself on that picture as to where you went?

A. Well, it is very hazy. The road comes through a gate right here near the foot of this little incline, and there are barns and several buildings and a clump of trees. I was right in this little turn-in or driveway into the barnyard itself.

Q. How long did you stay there?

A. I had observed two hunters coming in on the south dike road, coming up toward the buildings, and they were near the gate when I pulled into the barnyard of the club property.

Q. So did you approach them?

A. I approached them as they were driving out, and one car had started driving out and the other hunter was carrying [65] his limit of ducks, and they were each checked for their birds.

Q. Who checked them?

A. The number of birds, their duck stamp, and their hunting license, as well as a plug in their shotgun.

Q. Are either one of those two gentlemen defendants here today?

A. One I am positive of. The other, I am not sure.

Q. Who is that that you are positive of?

A. The one I had conversation with was Mr. Carty.

Q. You had conversation with Mr. Carty?

A. I did.

(Testimony of Jack E. Bedwell.)

Q. This was on October 21st, right after the season opened? A. That is correct.

Q. You had been watching over here on Gonzales Road since two hours prior to the shooting?

A. Yes.

Q. After the shooting started, you continued to observe this preserve here, and then you came on the premises as these two hunters were coming off?

A. Yes.

Q. And you had a conversation with Mr. Carty?

A. Yes.

Q. What was the conversation? [66]

* * *

The Witness: The conversation consisted of asking of Mr. Carty if he had gotten his limit of ducks, and he said that he had, and he asked me if I had brought my shotgun along and invited me to hunt on the club.

Q. (By Mr. Irwin): Was there not a dicsussion had with you, between Mr. Carty and yourself, about the beans that were on the premises? [67]

A. I didn't hear anything about any beans being on the premises from Mr. Carty.

Q. Nothing was said to you by Mr. Carty about beans? A. No, sir.

Q. While you were talking to Mr. Carty, did Mr. McCormick come up?

A. I believe that he did, yes.

Q. As a matter of fact, didn't you, with Mr. McCormick, turn around and go out and look over the beans? A. No, that is not correct.

(Testimony of Jack E. Bedwell.)

Q. Are you sure about that?

A. I am positive.

Q. Is it not true in substance and effect that a conversation was had between Mr. Carty, Mr. McCormick, and yourself, wherein they stated to you that the ducks will not eat those beans, they looked kind of bad, maybe we'd better cover them up, and you said that would probably be a good idea?

A. That is not so.

Q. You are sure no such conversation in substance took place between you?

A. Not in my hearing, it did not.

Q. I am talking about your hearing. I also understand you did not emerge from back of this gate and go out here by where these wagons were, right towards where the [68] south road bends? This is on opening day of the season.

A. Not at that time.

Q. How was it that this morning, Mr. Bedwell, on your direct examination, you said a remark by Mr. McCormick about there being some beans caused you to call Mr. Spicer on the two-way radio? Where did you hear that?

A. After I had the conversation with Mr. Carty, I then accosted two hunters who had been observed in the duck club, and there was an arrest made at that time. After the arrest was made, I did go down on the road to a position that represents a group of bean wagons, I think in this picture, where some decoys were placed.

Q. Where is this now?

(Testimony of Jack E. Bedwell.)

A. Right here, the back of one of the wagons on the right of that group of wagons that are parked there.

Q. That would be just west of dike No. 1, we will call it in that picture. Is that the way Mr. Johnson has it marked?

A. It is off more to the south than the west. Right down at the end of the wagon there.

Q. Do I understand you had no conversation with, or Mr. McCormick made no mention of beans, and you made no mention of beans?

A. Not when I first talked to this hunter, who was apparently Mr. McCormick, who was with Mr. Carty. [69]

Q. You know Mr. McCormick, don't you?

A. I know a James D. McCormick, yes. He was the man who was there and mentioned about the beans after I had talked to Mr. Carty.

Q. That is what I asked you a little while ago. Will you stand up, Mr. James McCormick? That is the gentleman I am talking about.

A. That is not the man I am talking about, until after the conversation with Mr. Carty. That is Mr. James D. McCormick, as I know him.

Q. He is not the gentleman you discussed the beans with? A. No.

Mr. Johnson: I did not hear the question.

Mr. Irwin: I say, he is not the gentleman that he had a conversation with about the beans, and he said no, sir.

The Witness: He is the man that mentioned

(Testimony of Jack E. Bedwell.)

about the beans after I had talked to Mr. Carty. Not at the time I talked to Mr. Carty.

Q. (By Mr. Irwin): I asked you earlier, Mr. Bedwell, if you talked to Mr. James McCormick.

A. You didn't say Mr. James McCormick. You said Mr. McCormick. I know him only as James D. McCormick, the man who was cited in that earlier arrest.

Q. Will you please tell me what Mr. McCormick said [70] about the beans, whether the name is James D. McCormick, or what it is? You did have a conversation with Mr. McCormick about some beans, didn't you? A. That day I did.

Q. What was the conversation?

A. Mr. McCormick stated that there was a few lima beans on the road that the birds hadn't cleaned up.

Q. What else did he say?

A. That's all at that time about anything pertaining to lima beans.

Q. Didn't he say that looked bad, maybe he'd better take a harrow and cover them up?

A. He did not say that to me.

Q. And you said you thought that would be a good idea?

A. He didn't say anything to me, nor did I make such a statement.

Q. Did you look at them then?

A. I did not.

Q. Did you look at them later?

A. I did later on in the evening.

(Testimony of Jack E. Bedwell.)

Q. I mean during the daylight, while he was there? A. I didn't.

Q. You didn't go any further onto the premises than where you have put yourself, where you say the decoys were [71] over here?

A. Yes, at the back of the wagon.

Q. That is as far as you went?

A. That is as far as I went at that time.

Q. How far would you have been from where you placed yourself at the intersection of this south road and this first dike here?

A. I did not measure it. I did not pace it off.

Q. Approximate it, will you, please?

A. Forty, possibly 60 yards. As I say, I didn't measure it.

Q. Was there anything to impede your vision from where you were to the intersection of that south road and the first dike there?

A. Only the grass that grows there.

Q. There is no grass on that road there, is there?

A. Not on the road, no; along the edges.

Q. Could you see the road from where you were standing?

A. I could see a portion of the road, yes.

Q. Do I understand it is your testimony that the only thing that was said by either of you is that Mr. James McCormick said, "There are some beans that the ducks haven't eaten," and you made no response?

A. That is the comment he made, yes. [72]

Q. And you said nothing? A. I did not.

(Testimony of Jack E. Bedwell.)

Q. By the way, what time of the day was this that you had the talk with Mr. McCormick about the beans?

A. It was around 2:00, possibly 2:15.

Q. Did I understand on your direct examination you said it was not until when that you contacted Mr. Spicer?

A. I was not able to get him immediately on the radio. It was around 4:30, possibly a quarter to 5:00, before I was abe to make radio contact with Mr. Spicer's car.

Q. Before I leave that subject, I want to be sure of this. I asked you a few moments ago whether or not you had been on the game preserve prior to the opening day of the season, and you said you had not. May I ask you this, whether or not you had been in the environs of the Santa Clara Game Preserve, either in your auto, going around the road here, or observing them, prior to the opening day of the season?

A. Not of the Santa Clara Game Preserve.

Q. Let's put it this way. Were you on the north road? A. I had been up that way, yes.

Q. How many days before the season opened?

A. I believe it was a couple of days before the season [73] actually opened.

Q. Did you come down around the east, what we will call the east road, too?

A. I may have in a routine patrol. We cover most of the main roads.

(Testimony of Jack E. Bedwell.)

Q. (By Mr. Irwin): You have your notes, do you, which would help tell you whether you were over here or not?

A. I don't have pencil notes from my patrol. No. We keep a diary of our daily activities.

Q. And where you went, do you not?

A. Generally, yes; that is, the general area.

Q. Let's see if I have it. Are you able to tell me positively now that about two days before you had been around the roads surrounding the Santa Clara Game Preserve?

A I was not in the sense of surrounding it. I was in that area, yes.

Q. Were you just sight-seeing, or were you looking over the grounds?

A. I was not looking over the grounds. I was on patrol for any early hunting that might be going on.

Q. When you were talking this morning about looking through the glasses and seeing these ducks taken from Mr. Carty and other members of the party, you don't want the jury [74] to think there was anything improper in Mr. Carty's having those five ducks in his possession, do you? A. No.

Q. The fact of the matter is, that is the limit, isn't it?

A. That is the legal limit, yes.

Q. How many days can a hunter, who is properly licensed and everything else being in order, how many days may he hunt and collect the legal limit?

A. I don't remember the exact number of days

(Testimony of Jack E. Bedwell.)

of the season. I know he is allowed certain days by the state and some by the federal government. It is 90 days.

Q. Do you know how many days the Santa Clara Game Preserve was operated?

A. No, I was not aware of their schedule of shooting.

Q. You don't know, as a matter of fact, they only operated two days a week?

A. No, I was not aware of that.

Q. I am speaking of prior to this date we are talking about. A. Any time.

Q. I believe you stated you reached Mr. Spicer around 4:30 on the radio, and where did you meet him?

A. At the Mound Water Company pump.

Q. You will forgive me, but I don't know the country [75] around there too well. Is that near the Santa Clara Club?

A. Well, it is quite some distance from there. It is in the area on the other side or on the north end of the mouth of the Santa Clara River.

Q. That was pursuant to your request on the radio?

A. Yes. I had asked him if I could meet him, or if he could meet me.

Q. I believe you said on direct examination this single remark by Mr. McCormick that the ducks hadn't been eating the beans caused you to ask Mr. Spicer to meet you, you stated, at the pump?

(Testimony of Jack E. Bedwell.)

A. That is what led me to contact Warden Spicer, yes.

Q. Up to that time your testimony is, as I understand it, that you had no information other than that statement of Mr. McCormick?

A. Just that statement that was made.

Q. And your curiosity hadn't been aroused at all to the point where you had gone out to see what he was talking about?

A. My duty at the time was to inform my immediate superior. He, being the senior warden in the district, was notified.

Q. As a matter of fact, Mr. Bedwell, there is quite a difference of opinion as to whether or not lima beans are [76] duck feed?

A. That I am in no position to answer. I don't know.

Q. Is it your considered opinion that lima beans are natural duck feed?

A. They may not be natural duck feed. If they are hungry enough, they will eat them.

Q. If there is other feed available, would you call them a duck feed?

A. It could be considered as such.

Q. It is usually attractive to ducks?

Mr. Johnson: Your Honor, I am going to object to this line of questioning on the following grounds: I think your Honor realizes that the issue here is whether they attempted, and the Act only requires that they attempted to lure, entice and attract the birds by means of feed. Now, whether the particular

(Testimony of Jack E. Bedwell.)

bait used is successful, whether the ducks eat it and enjoy it or not, is of no concern here. The question is whether it might have a tendency. I don't think that the fact that they were unsuccessful in their attempt, if such an attempt is shown to have been made, should be a point in this case.

The Court: Supposing they dumped a lot of garbage on the land?

Mr. Johnson: Under those circumstances, they would be [77] equally guilty, because I think your Honor is aware of the fact that hunters who are hunting in an area must investigate, and they then proceed at their own peril. If there was garbage on that area which might itself attract birds, they were violating the law.

The Court: I think the law is feed scattered as to constitute to such birds a lure, attraction, or enticement.

Mr. Irwin: That is my understanding of the law, your Honor.

The Court: I think you are going to have to show, or at least convince the jury, that whatever was scattered there was a lure, attraction or enticement. I think that is a question of fact.

Mr. Johnson: I think it is as to whether it has a tendency to, but I still think——

The Court: I don't think the law says "has a tendency to," does it?

Mr. Johnson: It has to have a tendency to lure, attract or entice the ducks.

The Court: No, it says "other feed that has been

(Testimony of Jack E. Bedwell.)

deposited, distributed or scattered so as to constitute for such birds a lure, attraction and enticement.''

I don't see anything about tendency.

Mr. Johnson: But I think it is a question of tendency, and it is not a question of whether he will eat it. [78]

The Court: I think that is a question for the jury. The objection is overruled.

* * *

Mr. Irwin: Will you read the question, please?

(Question read by reporter.)

The Witness: That I don't know.

Q. (By Mr. Irwin): I am going to ask your assistance, please, Mr. Bedwell. Referring again to defendant's Exhibit A, let's take the first day the hunting season was about to open, and then it opened, and you are over here on Gonzales Road. I take it you had your glasses with you on that day? A. Yes, I did.

Q. You were observing the premises? [79]

A. Yes.

Q. You saw ducks there? A. I did.

Q. Will you tell us numerically where the ducks seemed to be most congregated?

A. There was no general congregation or mass of ducks on any one of the ponds.

Q. Would you say that they were evenly distributed?

A. I did not count each bird to find out how many there was on one pond or the other.

(Testimony of Jack E. Bedwell.)

Q. As a matter of fact, isn't it true that the ducks were congregated down toward the east end of the game preserve where the fresh water was running?

A. There was possibly more birds down there than there was on the other end of the club.

Q. I have put my ruler towards the southeast in the picture between dikes 4 and 5, between what we have called the center road dike, and the north road dike. Do I understand you to say it is possible there were more ducks there than elsewhere?

A. No. In the general east area. I don't know whether there was too many over in that pond there or not.

Q. But you will go far enough to say with me that at the east end there seemed to be more ducks congregated than elsewhere on the preserve? [80]

A. It had that appearance. I didn't see any great concentration up there.

Q. By "up there" you mean what?

A. In the northwest corner.

Q. Did you see any great concentration of ducks up here in the southwest corner?

A. I could just barely see the top of what appeared to be the dike from the position that I was parked.

Q. Then we come to the second morning, which will be the morning of the 22nd. On that occasion, you were over here, as we have said, north of the north boundary of the preserves as they appear in

(Testimony of Jack E. Bedwell.)

Defendant's Exhibit A, and likewise you had your glasses, as you have testified to. Did you notice the concentration of ducks on that morning?

A. There were birds generally all over.

Q. Would you say they were concentrated more on the east end than on the west end?

A. No. Most of the birds were flying. They didn't seem to be feeding.

Q. What kind of a camera was it that was used in the taking of those pictures which have been identified as Government's Exhibits 2 to 9?

A. An Eastman Kodak, Flash Bantam, and an F. 45 lens.

Q. That is what we call a telescopic lens?

A. No, it is not a telescopic lens. It is just [81] the average camera.

Q. There was no extension on it at all?

A. No extension or filter.

Q. And I understood you to say Exhibit 3 was taken from the south road near dike 3?

A. Yes.

Q. Exhibit 4, as I understood your testimony, was taken at the intersection of dike 3 and the south road dike, is that right?

A. It was near dike 3. It was not at the intersection of it.

Q. How far away would you say the area represented by Exhibit 4 was from the area represented by Exhibit 3, or do you remember?

A. I didn't step it off. I don't remember just how far it was.

(Testimony of Jack E. Bedwell.)

Q. You do say, however, that it was near the intersection of dike 3? A. Yes.

Q. We will skip 5 for the moment. Your testimony was Exhibit 6 likewise was taken, showing Mr. Elder here, at south road dike at right angles with dike 3? A. Yes.

Q. And picture No. 8, I believe the testimony was that is looking toward the intersection of dike 3 with south [82] road dike?

A. On the south road dike, yes.

Q. So that, to recapitulate, Exhibits 3, 4, 6, 8, and let's take No. 9, too—withdraw that question.

As I understood your testimony, Exhibit 9 likewise is taken at the intersection of south road and dike 3?

A. That is where the birds were placed.

Q. So, to recapitulate, Exhibits 3, 4, 6, 8, and 9 all repersent the same area?

* * *

A. Yes. 3, 6, 8—well, 8 shows the intersection of 3.

Q. That's right; and 9? A. And 9.

Q. How about 4?

A. Four is near the intersection. It does not show the intersection. It is just a portion of the edge of the pond.

* * *

Q. Substantially the same area? [83]

A. In the relative area.

Q. All right. That leaves us now with Exhibits 5—it just leaves 5. You didn't cover 5. That Ex-

(Testimony of Jack E. Bedwell.)

hibit 5, I believe your testimony was that that was between dikes 2 and 3 on the south road.

A. That was near the intersection of the south road.

Q. Then that was likewise near the same intersection as these exhibits we have discussed?

A. Yes. It was taken at a different angle. That is a head-on picture of Agent Elder near the same spot as picture 6.

Q. So then we can put 5 in with that group, too, because those pictures are all in the same area?

A. Generally, yes.

* * *

Q. Where do you say that is, Exhibit No. 7?

A. That is taken on the south road dike, between dike 3 and dike 4, I believe.

Q. How far away is 7 taken from the area of 3, 4, 6, 8 and 9, which we have agreed are roughly in substantially the same area? [84]

A. I think it was about three or four, possibly five feet, or steps or paces, between the pictures as they were taken. They are not taken at the exact same spot.

Q. But, if I understand you correctly, three or four or five steps would be taken in a radius of from where I am standing to the first chair over there, would you say?

A. All of the pictures were taken from the same side of the dike and approximately five paces or maybe 10 feet distance between where these shots were taken.

(Testimony of Jack E. Bedwell.)

Q. In other words, the shots were within an area of 5 to 10 feet, one shot from the other, is that right? A. Yes.

Q. Would that also be true of 2?

A. Two was taken at the intersection of dike No. 4.

Q. But the balance of the exhibits, from 3 to 9, we were agreed were taken within a radius of 5 to 10 feet?

A. All of them were taken in that same area, but between each of those pictures there was a distance of approximately five paces or 10 feet.

Q. Let's take 5 and 7 here. Were they taken at the same time? By the same time, I mean while he was in the act of doing the same thing at the same spot?

A. No, he had moved west of the road when No. 7 was taken. He moved down west on south road and took the sample.

Q. Take Exhibit 7. In No. 7, we have a clear view [85] of the pond right behind us. He is right close to the grass on the edge of the pond. In 5, however, he is now bending over, yet in the same proximity to the pond, the same proximity to the seeds. Would you not say it is possible that those were different shots of the same act while he was in a slightly different pose?

A. No, they were not.

Q. I would like to clear up a matter, Mr. Bedwell. Is there anything in the regulations that prevents a club from putting out feed prior to the

(Testimony of Jack E. Bedwell.)

opening of the hunting season? A. No.

Mr. Johnson: Your Honor, I object to the question on the ground that that is a question of law, which only this court can decide.

The Court: Sustained.

Q. (By Mr. Irwin): One other question. From your experience, are you able to tell, if you see a few grains of barley on the ground, whether it has been there one day, a week or 10 days?

A. No, I have no way of determining how long it had been there.

Q. I don't pursue that line. I believe you stated that you yourself haven't any personal understanding as to the entire extent of the acreage involved in this Santa Clara [86] Game Preserve?

A. That is right. [87]

Redirect Examination

By Mr. Johnson: [88]

* * *

Q. Would you come over here, please? I will hand you Government's Exhibit No. 2 and give you a red pencil, and with this red pencil will you please approximate, to the best of your recollection, just where that particular picture or the scene portrayed in that particular picture is?

Mr. Irwin: Pardon me, Mr. Johnson. Might I suggest again, because the jury might want to look at the exhibit, that we mark them north and south and east and west, which you have not done with that picture?

(Testimony of Jack E. Bedwell.)

Q. (By Mr. Johnson): Is this north, approximately this way, along the same direction as east road? A. Yes.

Q. In other words, the direction in which the road is going, that would be north up here, and I will put "N" there. Is that correct?

A. Yes, that is correct.

Q. This is approximately east over here? [89]

A. Yes.

Q. And this is approximately west over here?

A. Yes.

Q. And this is approximately south, correct?

A. That is right. [90]

* * *

Q. Mr. Bedwell, did you have the opportunity to finish your job of setting out on the photograph, Government's [94] Exhibit No. 1 in evidence, the location of the scenes depicted in the photographs marked Government's Exhibits 2 through 9?

A. Yes.

Q. You have completed that. Now, is every one of those scenes as you have marked them on the photograph in the location stated by you to counsel for the defense yesterday?

A. No, they are not.

Q. Which one, if any, has been changed?

A. The picture that is depicted on the diagram here as No. 3 was stated originally to have been on dike No. 3, and on reviewing and laying the pictures out, the birds were not piled at the intersection of dike No. 3, but they were on dike No. 2,

(Testimony of Jack E. Bedwell.)

which shows from that picture No. 3, a portion of the roadway.

Picture No. 9 is taken—No. 8, rather, is taken from near the—closer than is actually marked here, because of these other spots or marks on the picture. It was taken nearer dike No. 3 and looking west toward dike No. 2, where the birds were placed.

Q. In other words, you could tell by looking again at No. 8 that the ducks which were depicted in 3 were, in fact, by this particular dike here, which you say is No. 2? A. That is right.

Q. So you made the change accordingly?

A. That is marked on the large photograph. [95]

Q. Now, I notice that in this photograph you have little squares and that would indicate in your mind the approximate location of the scene depicted in the particular photograph?

A. In a relative area, yes. It is not true to scale.

Q. I notice, also, you have drawn an arrow pointing toward the particular square representing a photograph or scene, and that there is a dot at the end of the arrow. What does that indicate?

A. Well, I placed myself at the dot and the direction of the arrow indicates the direction in which the picture was taken.

Q. And the numbers under each one of these refers to the particular exhibit or picture, is that correct?

(Testimony of Jack E. Bedwell.)

A. Yes, to the best of my knowledge. As I say, it is not according to scale.

Q. I notice that on 1, there is a large red—these are drawn in red pencil, I see. A. Yes.

Q. I notice in 1, there is a large area outlined in red. Is that a photograph?

A. That represents the photograph.

Q. Which number is it? A. No. 8.

Q. That is No. 8? [96] A. Yes.

Q. What does the jagged end on the square indicate, or on the figure?

A. Well, I placed the wavy line on the back of each rectangle to indicate that it goes into infinity. In other words, there is no line of demarcation there. The picture just goes out into space.

Q. In other words, the horizon is shown?

A. That is right. It is not close up, very.

Q. So that is it correct, for example, that if you tare taking a picture at this particular dot, facing in that direction, the picture shows a scene of the road ahead and going on into the horizon, and that is indicated by this jagged line, is that correct?

A. Yes, that is right.

Q. And you have done likewise with these others?

A. That is right, except on those that are indicated, 5, 6, and 7, which are close-up shots and show very——

Q. Very little background?

A. Very little background, yes.

(Testimony of Jack E. Bedwell.)

Q. You have got all 8 of the pictures entered on there, have you?

A. All 8 of the photographs that were taken are posted. [97]

* * *

Q. (By Mr. Johnson): Now, Mr. Bedwell, on the 21st of October, when was the first time you learned about there being any lima beans?

A. In the afternoon around 2:00, 2:15. The exact time that the conversation was heard by Mr. McCormick was not noted.

Q. Did you see the beans at that time?

A. No, I could not.

Q. And in accordance with your instructions, as you testified, you went ahead and radioed Mr. Spicer?

A. I radioed from my car and asked Warden Spicer to meet me there at a spot at his convenience.

Q. Was this in accordance with policy and instructions agreed upon among the wardens?

A. That is correct. At any time we had run into anything, that we were to contact Warden Spicer, who is the senior warden of the district, and to notify him of any violations or of any activity that we should investigate.

Q. You also testified on cross-examination that perhaps a couple of days before the season opened, you had been driving out on the north road on another matter, that is the north road of the club premises, and that you had also, perhaps, driven

(Testimony of Jack E. Bedwell.)

on the east road. Did you on either of those [98] occasions see any lima beans or barley on the premises?

A. No. I was really not looking for any particular thing on the club or any other club in the area.

* * *

Recross-Examination

By Mr. Irwin:

Q. With reference to that last question, Mr. Bedwell, isn't it true you cannot drive along the north road without seeing the ponds of the Santa Clara Game Preserve?

A. You can observe water and dikes of that property.

Q. Coming now again to this radioing Warden Spicer, I don't believe I quite have it clear—perhaps it is my fault—as to what time it was after leaving Warden Spicer that you made this nocturnal inspection with a flashlight?

A. It was after 5:45, nearing 6:00 o'clock.

Q. How much after?

A. About 5:45, between then and 6:00 o'clock. I didn't exactly mark the time or note the time as we went out to the duck blinds.

Q. What time was it you radioed him?

A. I was not able to contact Mr. Spicer until after 4:00 o'clock.

Q. I believe yesterday you said 4:30.

A. Well, it was after 4:00 o'clock.

(Testimony of Jack E. Bedwell.)

Q. How long after you made contact did you meet him? [99]

A. About 4:45, possibly 5:00 o'clock.

Q. He was in the immediate area then?

A. No, he was not in the immediate area. I did not know where he was.

Q. Do I understand arithmetically, then, it was between 15 minutes and a half hour after you established radio contact that he met you?

A. I can't say that. I don't know.

Q. What is your best estimate?

A. Possibly a half an hour.

Q. How long did this inspection by flashlight take the two of you?

A. That I don't know. I didn't time it.

Q. You made no record?

A. Other than I took a sample.

Q. I mean a record in your diary, as to what you were doing that day?

A. I did of the work that I did that day, but I did not time the amount of inspection that we made on the duck blinds that night.

Q. Well, was it 15 minutes?

A. It could have been.

Q. Could it have been less than that?

A. No.

Q. Could it have been a half an hour? [100]

A. Possibly that, yes.

Q. Was it more than a half an hour?

A. I can't say.

Q. You wouldn't say it was an hour?

(Testimony of Jack E. Bedwell.)

A. I did not say one way or the other, whether it was or not.

Q. I know you haven't, but I am trying to find out, Mr. Bedwell.

A. I did not time it. I don't know.

Q. You have been very accurate and precise on other matters here, Mr. Bedwell. This is quite important. Will you now try and search your recollection and please tell us, as nearly as you can, whether it was closer to 15 minutes or closer to a half an hour that you spent on this with your flashlight? A. Possibly it was 45 minutes.

Q. Any more? [101]

* * *

Redirect Examination

By Mr. Johnson:

Q. Mr. Bedwell, you testified on direct examination that when you made this nocturnal visit, using the flashlight, you took samples of what you thought was barley that you found on the premises of the Santa Clara club, and that you later gave that to Mr. Elder, I believe it was. A. That is correct.

Q. Will you again describe the sample that you took, that is, the receptacle in which you placed the sample?

A. I took two handsful of barley and placed it in a glass jar.

Q. Did you do anything else to the glass jar?

A. Yes. I affixed a mark of identification or a tag in the form of a gummed label across the front of the jar. [102]

(Testimony of Jack E. Bedwell.)

Q. Now, then, Mr. Bedwell, I hand you an object marked Government's Exhibit No. 10 for identification, and ask you if that is the jar, and the label, and if its contents are those to which you have referred in your testimony as being the sample that you took at 6:00 p. m. on the night of October 21.

A. That represents the pocketful of barley that I had taken from the Santa Clara game preserve on that night, yes.

Q. To the best of your recollection, is that the same bottle that——

Mr. Johnson: I am sorry. Didn't you hear, counsel?

Mr. Irwin: No, sir. May I have that read?

(The answer was read by the reporter.)

Q. (By Mr. Johnson): That was two handsful?

A. That was two handsful, yes.

Q. Is this the bottle, as you can best remember, that you put it in?

A. That is the bottle.

Q. Is this your printing on the label of the bottle? A. That is.

Q. Is that your signature there?

A. That is the way I normally sign.

Q. I notice it says "7:00 p. m." To what does that time refer? [103]

A. That refers to the time that the sample was taken.

(Testimony of Jack E. Bedwell.)

Mr. Johnson: The government offers this in evidence, your Honor, as Exhibit No. 10.

The Court: It may be received.

(The item referred to was received in evidence and marked Government's Exhibit No. 10.) [104]

* * *

Recross Examination

By Mr. Irwin:

Q. With reference to this Exhibit 10, which has just been offered here — by way of preliminary first, on this evening of the 21st, when you and Mr. Spicer came on the preserve, would you tell me again where you entered the preserve?

A. We drove through the gate and on what is known there as the north road dike. It is not on the property, but it is outside of the fence. The north road dike is shown in this first line and on this photograph. The road is outside of that property. We moved west to the northwest corner and parked near the northwest corner of the club. We came on to the club property on what is shown as the west dike, out to the middle dike of the club property. That is where we entered, from the southwest corner.

Q. Then where did you go?

A. We moved from the northwest corner to the middle dike, down the middle dike, and back and

(Testimony of Jack E. Bedwell.)

forth on what we know as dike 1, on the north and south side, on the middle dike, the north and south side, continued on the north and south sides of dike 3, 4 and 5.

Q. You said earlier that in compiling this sample, that this was from the pocketful that you picked up. Do I understand that as you went along you picked up a few grains here and a few grains there and put them in your pocket? [105]

A. No.

Q. What did you do? Did you pick these all up in one spot?

A. I picked that all up in one spot.

Q. Where was that spot?

A. To the best of my recollection, it was near the intersection of what we know as the middle dike and near dike 2.

Q. Was it all as clear as this when you picked it up and put it in your pocket, or did you sift it after you got back before placing it in the bottle?

A. That represents everything that was placed in my pocket.

Q. Notwithstanding it was dark and everything, you were able to pick it up in that condition?

A. I picked it up just like that in two hands.

Q. And you did not sift it or alter it in any way? A. No, I did not.

Q. Did your excursion take you over here on the south road?

(Testimony of Jack E. Bedwell.)

A. Yes. We came across on dike No. 2, back to the middle dike, and across dike No. 3 to the south road dike.

Q. These exhibits having been previously shown to the jury, I just want to lay this one, No. 8, right here.

Do I understand now from you that this Exhibit No. 8 is [106] taken roughly from about the point where I have the pointer, where there appears the figure 8, looking west towards the west terminus of the property?

A. Yes. It is taken from relatively that spot. It was actually back closer to the intersection of this dike, but rather than to superimpose that number and the spot over the other markings, it was placed at this position.

Q. So that, roughly, this is between 3 and 2?

A. That is correct.

Q. And this picture, then, would also include the area of 6, 5, 3 and 9, wouldn't it?

A. Roughly, yes.

* * *

Q. (By Mr. Irwin): I don't want to mislead you in any [107] way and so I will ask the direct question again to save time. What kind of a camera and what kind of lens was used in the taking of these Exhibits 2 to 9?

A. An Eastman kodak, flash-bantam, with an F.45 lens. That is the designation of the camera.

Q. Does that produce the size picture as is represented by Exhibits 2 to 9, without any blowing

(Testimony of Jack E. Bedwell.)

up? A. No, that does not.

Q. How big a negative is produced by the camera that you used in obtaining Exhibits 2 to 9?

A. Slightly larger than 35mm.

Q. Could you tell us what that is?

A. Possibly an inch and three-quarters to an inch and one-quarter. I don't know the exact dimensions of the negative itself.

Q. So that Exhibits 2 to 9, as we see them here, are blown up from a 1½ to 1¾ inch negative?

A. They are enlarged negatives, yes.

Mr. Irwin: That's all. Thank you, Mr. Bedwell.

* * *

JOHN MASON SPICER

called as a witness by and on behalf of the government, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Johnson:

Q. Mr. Spicer, where do you reside?

A. I reside at Ojai, Ventura County.

Q. What is your occupation?

A. I am a State Game Warden and a Deputy United States Warden.

Q. What are your duties in those regards, generally?

A. Enforcing the laws of California Fish and Game Commission and the migratory laws of the Fish and Wildlife Service.

(Testimony of John Mason Spicer.)

Q. That is as a Deputy Federal Game Warden?

A. Yes.

Q. For what area are you responsible in that capacity? A. Mostly Ventura County.

Q. Do you have any game wardens working under you? A. None under me, no. [109]

Q. How long have you been in the service, that is, in this position?

A. Approximately 14 years.

Q. Do you know the defendants in this case?

A. Yes, I do.

Q. Do you know all of them?

A. By sight, yes; not all by name.

Q. Can you point out all of them to us?

A. There are two defendants sitting at the counsel table, and the balance are over on the left in the front two rows.

Q. Do you know where the Santa Clara River Game Preserve is located? A. Yes, I do.

Q. Is that a private hunting club?

A. Yes, it is.

Q. Directing your attention to the date of October 21, 1949, did you have occasion to call at the Santa Clara hunting club on that particular date? A. No, I didn't.

Q. What day did the hunting season open?

A. It opened the 21st at noon.

Q. Where were you in the afternoon of the 21st?

A. We were patrolling. I was accompanied by Warden Edgerton. We were patrolling the other two large clubs, as [110] we call them, the Ventura

(Testimony of John Mason Spicer.)

County Club and the Point Magu Game Preserve.

Q. Where were you at 5:30 or 6:00 p. m. that evening?

A. At 5:30 or 6:00 p. m., we were in the vicinity of the Santa Clara river bottom.

Q. What were the circumstances of your being present at that place?

A. Warden Bedwell had contacted us by radio and said that he wished to see us to compare notes on the opening of the hunting season.

Q. Did you meet Warden Bedwell?

A. Yes, we did.

Q. Where did you meet him?

A. At the Mound Water Company.

Q. This was at about what time?

A. Well, I would say approximately between 5:00 and 5:30.

Q. Did you call on the premises of the Santa Clara club after that?

A. We did that evening, yes.

Q. Wasn't that on the 21st of October?

A. Yes. I was confused there. That was the evening of the 21st.

Q. So that on the evening of the 21st of October, you did have occasion to call at the premises of this private hunting [111] club?

A. Yes, we did.

Q. Would you go ahead and tell of your visit to this club? Tell the court and jury what happened.

A. Well, on meeting Warden Bedwell at the Mound Water Company, he informed us that he

(Testimony of John Mason Spicer.)

had seen quite a large quantity of feed on this Santa Clara Game Preserve, so I said I felt that we should check it. So we proceeded to the Santa Clara——

Q. Excuse me for interrupting. Did he say he had seen the feed on the club?

A. Yes, he had told us that, yes.

Q. Go ahead.

A. So we proceeded to the Santa Clara Club. It was approximately 6:00 o'clock that night. We then——

Q. Did you enter the premises of the club?

A. Yes, we did.

Q. And what were the conditions as you found them when you entered the premises of the club?

A. We went down the west bank to the middle dike, spasmodically flashing our light, and at no time while we were flashing our light did we cover the ground without seeing grain on it.

We traveled down the middle dike of the club and discovered grain that, to me, it seemed to me as though it had [112] been poured from a two-pound coffee can. There were piles of it. You could easily reach down and get two handsful without even touching the ground. As I remember, I stayed in the main dike most of the time. The other wardens branched off on the side dikes.

I did notice the grain in the pickle weed along the edges of the middle dike, and also large piles of grain intermeshed with the pickle weed.

Q. What kind of grain was this?

(Testimony of John Mason Spicer.)

A. It was barley.

Q. Did you pick up any of this grain and examine it? A. Yes, I did.

Q. Showing you an object marked Government's Exhibit No. 10 in evidence, does the material in that picture representing this object resemble or is it a fair sample of the grain that you saw there on the evening you mentioned and under the circumstances which you have described?

A. Yes, I think it is.

Q. Go ahead. Did you see anything else?

A. No, not at that time.

Q. What then occurred after you had made this tour over the premises of the club?

A. Samples were taken and we departed from the club.

Q. Did you see Mr. Bedwell taking a sample, Warden Bedwell? [113] A. Yes, I did.

Q. Did you take a sample yourself?

A. Yes, I took some grain.

Q. What happened to yours?

A. I enclosed mine in a manila envelope, and the next morning I turned it over to Mr. Elder.

Q. What then occurred?

A. We left the club, went back to the Mound Water Company, and I departed for Ojai, telling the other two wardens that I would notify my superior immediately.

Q. Who was your superior?

A. Captain Fred Hecker.

Q. Is he now living? A. He is dead.

(Testimony of John Mason Spicer.)

Q. He was living at that time?

A. Yes, he was.

Q. Go ahead.

A. So I arrived home approximately 8:00 o'clock at Ojai. I immediately called Captain Hecker, who in turn told me to notify Mr. Elder.

Q. Did you notify Mr. Elder?

A. I called Mr. Elder, yes.

Q. Where did you phone him?

A. I phoned his residence at Glendale. I was informed that he was in Bakersfield. I then called Bakersfield and [114] contacted Mr. Elder.

Q. Did you have a conversation with him at that time? A. I did, yes.

Q. What time of the day was it, approximately?

A. I would say approximately 8:30.

Q. This was on the evening of the 21st of October? A. Yes.

Q. How did you know it was Elder that you were speaking to?

A. I recognized his voice.

Q. Go ahead. What was said during the conversation?

A. I just informed Mr. Elder that we had taken some samples of grain on the Santa Clara preserve and that there was more, there was a great deal of grain there, and I thought he should investigate it.

Q. Was this in accordance with your instructions from your superiors, that you phoned Mr. Elder?

A. Yes, it was.

Q. What did you then do, if anything?

(Testimony of John Mason Spicer.)

A. Mr. Elder told me that he would meet us in Ventura the next morning; so I called Warden Edgerton and Warden Jack Bedwell and told them to meet me at Ventura at 6:00 o'clock the next morning.

Q. Have you told all the conversation that took place [115] between you and Mr. Elder at the time you phoned him? Did he make any comment at the time you told him about this advice?

A. Mr. Elder had stated that he had planned to check the clubs at Ventura County.

Q. That is, he had planned in the then future?

A. Yes.

Q. Go ahead. You arranged to meet, you said, Wardens Bedwell and Edgerton? A. Yes.

Q. Did you meet them? A. I did, yes.

Q. At what time did you meet them?

A. At approximately 6:00 o'clock in the morning of the 22nd.

Q. Who else was present?

A. Warden R. E. Bedwell from Santa Barbara.

Q. Was Mr. Elder present?

A. Yes, he was.

Q. Did you, after that meeting, visit the premises of the club, the Santa Clara club?

A. Yes. We proceeded to the Santa Clara game preserve.

Q. Will you tell us the circumstances of that visit to the club, or what occurred?

A. We arrived there at approximately 6:30 and stopped [116] our cars at the edge of the Santa

(Testimony of John Mason Spicer.)

Clara River bottom, I would say approximately two-tenths of a mile from the Santa Clara game preserve, where we observed hunters on this particular club shooting ducks.

Q. Could you hear shots?

A. We heard shots.

Q. Did you see ducks in the area?

A. I saw ducks in the air. I saw no ducks on the water. I saw them flying in the air, and I saw several ducks fall.

Q. Excuse me. Do you mind if I interrupt and take you back to the night before? Did you see any ducks when you were inspecting the premises during your nocturnal visit?

A. Yes. We disturbed ducks on the ponds at that time.

Q. You could see ducks? A. Yes.

Q. Were there many of them or a few of them?

A. Well, it seemed as though it was a good many, yes.

Q. I am sorry to have interrupted you, but you left off when I did interrupt you at the point where you were observing hunters on the premises.

A. Yes. I counted approximately 10 or 12 hunters on this particular club. I saw ducks fall.

Q. What did you do then?

A. I proceeded with Mr. Elder down this east road.

Q. Referring to the diagram.

A. Yes, down the east road to the conjunction of the south road dike.

(Testimony of John Mason Spicer.)

Q. What then occurred?

A. We noticed a hunter approaching the east road carrying two ducks, and on coming to this cross section, we identified the hunter as Mr. Carty.

Q. Was there a conversation with Mr. Carty at that time? A. Yes, there was.

Q. Pardon me? A. Yes, there was.

Q. Did you have a conversation with him?

A. I just spoke with him. He shook hands with me and we passed the time of day.

Q. Did you hear a conversation in which he took part? A. Yes, I heard it.

Q. What was said during the conversation?

A. Mr. Elder informed Mr. Carty that he was sorry to see him here, and Mr. Carty asked him why, and Mr. Elder informed him that the club was covered with grain and that all members shooting on the club were in violation, because they were shooting over baited ponds. [118]

Q. What did Mr. Carty say then?

A. Mr. Carty said, "Well, don't arrest me. Arrest the club."

Mr. Elder informed him it was not a matter of arresting the club, it was a matter of citing the individual hunters on that club.

Q. Did Mr. Carty say anything else at that time?

A. I don't remember him saying anything more.

Q. Did he say anything about other clubs?

A. I didn't hear him say anything about any other clubs.

(Testimony of John Mason Spicer.)

Q. Was there any other part of the conversation you can recall now?

A. Not that I can recall.

Q. What did you do then, if anything?

A. I proceeded with Mr. Elder to the opposite side of the club, as we had seen hunters start to leave.

Q. By the opposite side, where do you mean?

A. Well, that would be on the west side of the club.

Q. The north or south?

A. On the south, southwest corner of the club.

Q. Where did Mr. Carty go, if you know, during this time?

A. Well, he went over to recover a duck, I believe, in an adjacent field. [119]

Q. And you and Mr. Elder, did you drive over to the southwest corner?

A. Yes, we did.

Q. What occurred after you got there?

A. Well, there were two hunters coming out in a car, and we pulled alongside them and stopped, and the two hunters got out and we started to talk to them.

Q. Who were they, do you know?

A. The two hunters being Mr. Maxwell and Mr. Doud.

Q. Which Doud, do you know? Which Mr. Doud?

A. Let's see. Mr. Jim Doud, I believe, James Doud.

(Testimony of John Mason Spicer.)

Q. James Doud. What then occurred, if anything?

A. Mr. Elder also informed them that he would have to take their names as they had been shooting over baited ponds. He asked Mr. Maxwell if he had seen the grain coming in, and Mr. Maxwell said no, that he hadn't seen any grain.

Mr. Elder asked if he was familiar with the regulations as to feeding or scattering grain on the club.

Mr. Maxwell said yes, he was, that he had dozens of Fish and Wildlife pamphlets in his office.

Their names were taken and their ducks were deposited in Mr. Elder's car.

Q. Was there anything else said in this conversation that you can recall?

A. I think at the time that Mr. Maxwell said that he [120] hadn't seen any grain coming in, Mr. Elder said, "Well, I could pick up a couple of bucketsful right here," pointing down to the ground right in front of the car.

Q. Was there grain there?

A. Yes, there was. There was some grain and lima beans.

Q. Was there anything else said in that conversation that you can recall?

A. Not that I can recall right now, no.

Q. Was anything said by Mr. Maxwell about when material had been placed on the pond?

A. I can't recall him saying that.

(Testimony of John Mason Spicer.)

Q. Was anything said by him about what kind of material had been placed on the ponds?

A. Not at that time. I can't recall him saying that.

Q. What then occurred?

A. Well, after talking to the first two hunters, we proceeded out on the south road dike and met, I think, four other hunters coming in with their birds.

Q. Are any of them defendants in this case?

A. Yes.

Q. Who are they?

A. Mr. Maulhardt and Mr. Doud.

Q. What occurred at that time? [121]

A. Mr. Elder also informed them of the same situation and took their names, checked their licenses and their duck stamps, and asked them to leave their ducks on the dike.

Q. Did he tell them to throw them down themselves in some particular spot?

A. Yes. Our car was near us and they were putting their ducks in front of the car.

Q. Near what cross dike was that, if you recall?

A. Well, it was either the second or third. I believe it was the third.

Q. Showing you Government's Exhibit No. 8 in evidence, is that the car to which you referred, and the place where it was parked?

A. That is Mr. Elder's car, yes.

Q. You say it was parked. Is that the place where it was parked at the time you refer to?

(Testimony of John Mason Spicer.)

A. Yes.

Q. Are you able to tell from that picture where they had thrown down their ducks at Mr. Elder's request?

A. Well, it was right up in front of the car here and at this cross dike.

Q. That would be cross dike No. 2?

A. Yes, that would be it, yes.

Q. What were the names of those first two hunters Mr. Elder advised? [122]

A. Mr. Maxwell and Mr. Doud.

Q. Had they put down their ducks, too, at Mr. Elder's request?

A. Yes. We had put the ducks in the car because we met them further off the club.

Q. Then you drove up to the point where it was parked? A. Yes.

Q. Had Mr. Elder issued any slips to them of any kind? A. I believe he had, yes.

Q. What occurred after you met these other hunters, if anything?

A. He didn't issue any citations to them, no. He took their names and addresses.

Q. What occurred after you met these other hunters?

A. Their names and addresses were taken, and when they left their ducks, they proceeded down the south road dike.

Q. What did you do then?

A. Just about that time, after these hunters had left, the other wardens had come over from the

(Testimony of John Mason Spicer.)

east road, had walked through the club and come over from the east road.

Q. Did you conduct an inspection of the premises on this occasion? [123]

A. After the wardens had come over from the east road, I walked down dikes 2 and 3, checking for grain and checking the blinds.

Q. What did you find?

A. I found grain intermixed in the pickle weed along these dikes.

Q. Could you more exactly describe where you found it?

A. Well, it would be on dikes 3 and 4, in front of the cars.

* * *

Q. (By Mr. Johnson): Go ahead.

A. It would be on dikes 3 and 4.

Q. What kind of grain was it that you found?

A. Barley.

Q. Did you find anything else besides barley?

A. There was lima beans spread on the south road dike.

Q. Did you examine any of the cross dikes?

A. Yes. Three and four would be the cross dikes that I examined.

Q. What did you find there?

A. I found barley in with the pickle weeds.

Q. What occurred after that, after you joined the [124] other wardens?

A. That is when I worked some of the cross dikes.

(Testimony of John Mason Spicer.)

Q. After you had worked the cross dikes, what did you do?

A. We went back to the point where the ducks were on the south road, and Mr. Bedwell proceeded to take pictures of the grain and beans.

Q. I am showing you Government's Exhibit No. 2 in evidence. As you can best recollect, does that portray the scene photographed by Mr. Bedwell on the occasion to which you have referred?

A. Yes, it does.

Q. And does that represent the conditions as you saw them at that time? A. It does.

Q. Showing you Government's Exhibit No. 3, which is a photograph, in evidence, does that represent a scene photographed by Mr. Bedwell at the time and under the circumstances to which you referred? A. Yes, it does.

Q. Does that portray the conditions of the area as you saw them at that time?

A. Yes, it does. [125]

* * *

Q. (By Mr. Johnson): Showing you Government's Exhibit Nos. 4 through 9, I will ask you to examine them and tell the court and jury whether these portray scenes which, to the best of your knowledge and recollection, were photographed at the time you have mentioned by Mr. Bedwell, and also whether they depict the conditions of the premises as you saw them and have described them at that time. Take your time.

A. Yes, they all do.

(Testimony of John Mason Spicer.)

Q. You are pictured in one of these photographs as a matter of fact, aren't you?

A. Yes, I am.

Q. Let's check to see which one it is. You are in Exhibit No. 3? A. Yes.

Q. On the extreme right. Was this taken at the point where the birds had been put down by the hunters as they came off?

A. Yes, in the approximate location.

Q. I notice the birds in the picture.

A. Yes.

Q. You said you encountered two hunters as you came into the premises, and as you walked out you saw some others, I think four altogether. Did you see any other hunters coming off the premises [126] of the club?

A. I saw hunters leaving on the east side of the club.

Q. How many were there?

A. I would say four, five, or six, approximately.

Q. Did you see any other hunters?

A. No.

Q. Did you see Mr. Elder encounter any other hunters?

A. Not that I remember, no.

Q. Were you with Elder at all times, or were you separated from him?

A. No, I was not with him all the time. I crossed the cross dikes, checking the dikes for grain.

Q. And you did find barley there, as you have stated? A. Yes, I did.

(Testimony of John Mason Spicer.)

Q. Where did you find the lima beans, again?

A. On the south road dike.

Q. Will you describe the area where the lima beans were? Describe how they were placed.

A. Well, about the best way to say is it just looked like that it had been paved with lima beans. I would say that the width would run from, oh, eight or nine feet to 12 or 15 feet wide.

Q. Did you take any samples at that time?

A. No, I did not. [127]

Q. Did you see anyone else take any samples?

A. I saw Mr. Elder taking samples.

Q. How many did he take that you saw?

A. Two. He took one sample of the beans and one sample of the barley.

Q. Do you recall the receptacles in which he placed them, if he did put them in receptacles?

A. The beans were taken in a cup, as I remember, and the barley was deposited in a milk container.

Q. Did you have any other conversations with hunters, other than what you have already stated?

A. Not that I remember, no, sir.

Q. Did you notice any grain or lima beans, or any material of that sort, in the water, the pond?

A. In one pond, I noticed barley strewn from the dry ground down into the pond, as though someone had walked with a sack with a hole in it.

Q. Would that be as shown in this particular scene, Government's Exhibit No. 4?

A. Yes, that is it.

(Testimony of John Mason Spicer.)

Q. That is the particular area to which you refer? A. Yes.

Q. That was what kind of grain, again?

A. That was barley.

Q. Were there any lima beans in that [128] particular area?

A. Not that I remember.

Q. In other words, that was just barley?

A. Yes, sir.

Q. What did you do then after you took the pictures? Did you call again at these premises? Well, strike that. Did you leave the premises at that time?

A. Yes, we left the premises.

Q. And did you call again at these premises on that day? A. No, I did not. [129]

* * *

Q. (By Mr. Johnson): Mr. Spicer, you said you have been a game warden for 14 years?

A. Yes, approximately.

Q. You are familiar, then, with the habits of various game animals and birds, including migratory waterfowl? A. Yes, to some extent.

Q. Are you familiar with their eating habits?

A. To some extent, yes.

Q. In your opinion, would ducks be likely to be enticed or attracted by lima beans?

A. Yes, I think so. In traveling through the country, I have had ranchers tell me of ducks landing in their bean fields.

(Testimony of John Mason Spicer.)

Q. Under what conditions might they eat lima beans or might not eat lima beans? Will you go further into that?

A. I think in an area where beans are prevalent, they have a tendency to feed on the beans, or grain, or whatever is abundant in the area.

Q. How about geese, would they eat lima beans?

A. I think they would, yes.

Q. On what do you base that thought?

A. On the fact that geese have been reported to feed in lima bean fields where no other grain has been growing. [130]

Q. Are there a lot of lima beans grown up around Oxnard?

* * *

Cross-Examination

By Mr. Irwin:

Q. Mr. Spicer, I believe you stated that it was on the evening of the 21st, which was the day the season opened, that you went on the premises of the Santa Clara Game Preserve.

A. Yes, that is correct.

Q. How long prior to that time had you been on the Santa Clara Game Preserve?

A. I don't remember exactly. It might be some time.

Q. Would you say within the week?

A. Not that I remember, no.

Q. Do you keep a record of where you go and what you cover on your patrols?

(Testimony of John Mason Spicer.)

A. Yes, I do.

Q. Do you have that record with you?

A. No, I don't.

Q. You presently haven't any independent recollection as to whether or not you were on the Santa Clara Game Preserve within a week prior to October 21st?

A. No, I haven't. I did not see any occasion to. [131]

Q. You wouldn't say that you were not?

A. I don't remember being on it, no.

Q. Now, do I understand that your duty is that of warden for Ventura County?

A. I am a state warden assigned to Ventura County, yes.

Q. Some of these defendants you have known for a considerable period of time?

A. I did not hear the first part of that question.

Q. Some of the defendants you have known for a considerable period of time?

A. Yes, I have known them—not personally.

Q. Do you know a state game warden by the name of Getman? A. Carlos Getman, yes.

Q. It is a fact, is it not, on the 15th of October, six days before the season opened, he advised you that Mr. James McCormick had requested that you game wardens please come down and check over their preserve and see if it was in good order before the season opened?

A. I don't remember that conversation. I saw no reason to do it. They were warned the year

(Testimony of John Mason Spicer.)

before, and I saw no reason to go back and check their club.

Mr. Irwin: May I have my question read again?

(The question was read by the reporter.)

Mr. Irwin: And now the first part of the answer.

(The answer was read in part, as follows: "A. I don't remember that conversation.")

Mr. Irwin: I now move that the balance, after "I don't remember that conversation" be stricken.

The Court: It may go out.

Q. (By Mr. Irwin): One of the principal duties of the game warden, one such as yourself, Mr. Spicer, is the conservation of wild life, is that not true? A. That is true, yes.

Q. And you are to prevent violations whenever possible, isn't that so? A. Yes, we are.

Q. I believe you stated after you entered the preserve in response to Mr. Bedwell's statement that he had seen quite a lot of feed on the Santa Clara Game Preserve, after you had gone over there, you had then called Bud Elder and reached him at Bakersfield? A. Yes.

Q. As a matter of fact, you talked to Mr. Elder prior to this about the fact that you were going to raid the Santa Clara Game Preserve, did you not?

A. I don't remember.

Q. You don't remember?

A. No, I dont' remember speaking to him. [133]

Q. You wouldn't say you hadn't?

A. Yes, I would say I hadn't.

(Testimony of John Mason Spicer.)

Q. And that you had had no conversation, either in person, by phone, or written communication with Mr. Elder about the Santa Clara Game Preserve within two weeks prior to the opening of the season?

A. I don't remember any conversation, any such conversation.

Q. When you reached Mr. Elder by phone, he was at the home of Les Arnold, was he not?

A. He was at the home of Warden Arnold, yes.

Q. He is also a state game warden?

A. Yes.

Q. Do you know a man by the name of Jack White? A. Yes.

Q. What is he, officially?

A. He is Ventura County game warden. He is employed by the county.

Q. He operates for the County of Ventura in the same jurisdiction you operate for the state?

A. That's right.

Q. Is it not a fact that within two years last past you were active in attempting to have the office of county game warden abolished? [134]

* * *

The Witness: It is not a fact.

Q. (By Mr. Irwin): You know, do you not, that there was presented to the County Grand Jury of Ventura for their recommendation to the Board of Supervisors, a recommendation that that office be abolished?

A. I had seen a copy in the paper, or an article

(Testimony of John Mason Spicer.)

in the paper giving all the grand jury's recommendations in Ventura County.

Q. You know, do you not, that Mr. Maxwell was attorney for the group that led the fight to retain the county game warden?

A. I did not know that.

Q. It is your testimony that you took no interest in that grand jury matter looking towards the abolition of that [135] office?

A. That is right.

Q. Going back to the evening of October 21, after you met Mr. Bedwell, how did you go to the club, by auto, or did you walk from this auto tower?

A. We drove from the Mound Water Company.

Q. Let's get these pictures again. I think it is always better to use pictures. I am directing your attention to Government's Exhibit 1. Will you please tell us where you came on and how you approached the Santa Clara Game Preserve, looking at Exhibit 1? This is the evening of October 21.

A. We approached from the north across the Santa Clara river bottom here, approached from the north and drove up the north road, drove up opposite the north dike on the road that was alongside the fence of the Santa Clara Game Preserve.

Q. Where did you come on to it?

A. On to the west end of the club. We parked our car at the——

Q. I believe you stated you walked down dikes 2 and 3 also?

A. No, I didn't. I said that I walked down and checked dikes 2 and 3 the next day.

(Testimony of John Mason Spicer.)

Q. I beg your pardon. What did you do that evening? [136]

A. I walked down the middle dike, as it is called, on the board.

Q. How far did you walk?

A. I walked approximately down to the east end of the club on the main dike.

Q. On that evening, you did not walk across the dike?

A. I walked out on the dike adjacent to the middle dike road.

Q. How far either way?

A. Oh, 15 or 20 feet.

Q. The next day I take it you did not make any inspection of the place before the shooting started, because it was dark, wasn't it, until just about when the shooting commenced?

A. You mean the next morning?

Q. Yes, the 22nd. A. That is right.

Q. The inspection you made was after the events you have described, and the hunters were all gone?

A. Yes.

Q. When you walked over the dikes on that occasion, what group did you traverse?

A. Well, I accompanied Agent Elder up this south road dike and checked the dike where the beans were spread, [137] and also went in on the cross dikes.

Q. How far in did you go?

A. Well, I believe I went right across the middle dike and checked the cross dikes, oh, 2, 3 and 4.

(Testimony of John Mason Spicer.)

A. No. We were all in a group. I had told him before, the evening before, the condition of the club, so there wasn't any point in going over it in the meantime, because we were proceeding down to the club, anyway.

Q. When you told him over the phone the night before, did he say anything to indicate he knew about it, or was it all news to him?

A. He didn't indicate one way or the other. He said he had planned on checking the clubs in Ventura County. Whether [140] he meant the immediate future or not, I don't know. I told him the condition of the club, and he said he would come down on that morning.

Q. But it is your contention that when he met Mr. Carty, and Mr. Carty asked him what the situation was, Mr. Elder said, "Shooting over baited grounds"? A. Yes.

Q. In any event, up to the time, from 6:00 o'clock in the morning up to the time you approached Mr. Carty, neither Mr. Elder nor yourself had been on the Santa Clara Game Preserve?

A. I don't know whether Mr. Elder had been on it. I had been on it.

Q. From the time he met you at 6:00 o'clock, certainly he was not on the preserve because you were together, weren't you?

A. We had breakfast together, yes.

Q. Did you stay together from that time until the time you met Mr. Carty?

A. We weren't together down here.

(Testimony of John Mason Spicer.)

Q. Where was he then?

A. He was in the approximate area, but I was not right beside him all the time.

Q. How far away were you?

A. Well, 15, 20, 30 feet, maybe. [141]

Q. If you were off the preserve and he was within 15 or 20 feet of you from the time you met him that morning and had breakfast up to the time he approached Mr. Carty, to your knowledge had he been on the premises?

A. To my knowledge, no.

* * *

Q. (By Mr. Irwin): I am showing you now Government's Exhibit 8. There are two autos on here. I believe your testimony is those autos are parked approximately opposite dike No. 2, is that correct? A. Approximately, yes, I believe.

Q. Looking at Exhibit 1, will you please tell us where the dike No. 2 is?

A. I would say it would be there (indicating).

Q. So that is where his automobile was, these two cars that are in this picture? A. Yes.

Q. All the pictures which have been introduced here, Nos. 2 to 9, do you subscribe to Mr. Bedwell's testimony as to where he has affixed them on Exhibit 1? [142]

A. I was not with him all the time he was taking the pictures. I was wandering up the dikes, checking the dikes.

Q. As to the place where you appear in the

(Testimony of John Mason Spicer.)

picture, Exhibit No. 3, in any event you are there, aren't you? A. Yes.

Q. And Exhibit No. 3, Mr. Bedwell, on Government's Exhibit No. 1 has placed that as being opposite dike No. 2? A. Yes.

Q. Is that your best recollection as to where that picture was taken? A. I think so, yes.

Q. When you gave the conversation had between Mr. Maxwell and yourself, did you give the entire conversation, as you can presently recollect it?

A. I didn't have any conversation with Mr. Maxwell.

Q. Or when you overheard a conversation between Mr. Maxwell and Mr. Elder, did you give the substance of it in its entirety as you now recollect?

A. I can remember him mentioning to Agent Elder that he was an officer of the club, I believe he said he was secretary-treasurer of the club, and that he had ordered or had some grain put out 10 days previous to the hunting season.

Q. Now, I believe you stated that the day the season opened, you were around inspecting the other clubs as well? [143] A. Yes, that is right.

Q. It has been customary, has it not, for all clubs to put out feed some time prior to the opening of the season? A. Some time prior, yes. [144]

* * *

(Testimony of John Mason Spicer.)

Redirect Examination

By Mr. Johnson:

Q. Mr. Spicer, referring to the conversation with Warden Carlos Getman brought out on cross-examination, what did Mr. Getman say to you on that occasion?

A. I don't remember any particular conversation.

Q. But you have talked to him?

A. I was ordered to the Los Angeles office about that date and it might have slipped my mind. I was ordered there for extra duty.

Q. Referring to the morning of October 21, 1949, which was the date of the opening of the season, did you have occasion at that time to have a conversation with this County Game Warden, Jack White, to whom counsel has referred?

A. Yes, I did.

Q. Could you tell us that conversation?

A. Approximately 9:00 o'clock in the morning, the County Game Warden called and asked if we were going to work the clubs.

I said that we had planned to and that Warden Edgerton and I would probably work the large clubs, as we call them, the Ventura Game Preserve and the Point Magu Game Preserve.

Q. This was, of course, before Warden Bedwell had [145] told you of the apparent violation at the Santa Clara club? A. That is right, yes.

Q. Go ahead.

(Testimony of John Mason Spicer.)

A. He said that he had checked all the clubs and there wasn't any grain on any of them.

Q. He said all the clubs?

A. He had checked all the clubs and he didn't see any reason why they couldn't go ahead and shoot.

Q. When you did find out that evening, after your inspection of the premises on the night of the 21st, that there was an apparent violation of the baiting regulation, why didn't you notify the Santa Clara Club or its members of that fact, that they were violating the law?

A. I didn't see any necessity to.

* * *

Q. (By Mr. Johnson): The hunting season did open that [146] day at noon, didn't it?

A. Yes, it did.

* * *

ALVIN W. ELDER

called as a witness by and on behalf of the government, having been first duly sworn, was examined and testified as follows:

* * *

Direct Examination

By Mr. Johnson:

Q. Mr. Elder, where do you reside?

A. Glendale, California.

Q. What is your occupation?

(Testimony of Alvin W. Elder.)

A. United States Game Management Agent.

Q. For what area?

A. Southern California.

Q. What are your duties, generally, in that respect?

A. Generally, my duties are the enforcement of the Migratory Bird Treaty Act regulations and the Lacey Act, and several other federal laws that are not involved in this case.

Q. How long have you been in the federal service, Mr. [147] Elder?

A. Since December 3, 1936.

Q. That is when you came with them?

A. That is when I came with them.

Q. Have you been with them ever since?

A. With the exception of a year in the Army.

Q. Referring to the area of Oxnard, California, do you know or are you aware of the existence of a shooting club or hunting club known as the Santa Clara Game Preserve? A. I do.

Q. Did you have occasion to call at that club on either October 21 or October 22, 1949?

A. On October 22.

Q. On how many occasions did you call there on that day? A. At least three times.

Q. When was the first time?

A. At approximately 1:00 a.m.

Q. On the date of October 22nd?

A. October 22nd.

Q. What caused you to call at the club at that time?

(Testimony of Alvin W. Elder.)

A. I had been reached by phone call from Warden Spicer while I was in Bakersfield the night before, advising me that——

Q. Did you have a telephone conversation with him at [148] that time, then? A. I did.

Q. Tell us what that conversation was.

A. Warden Spicer, at approximately 8:30 p.m., when the call came in, told me that the Santa Clara Game Preserve was baited with barley, and that he had called his captain, Captain Hecker, and Captain Hecker had advised him to get in touch with me.

Q. What did you say to him?

A. I told him that I had intended to check all the clubs of the Ventura County-Oxnard area shortly and that—at first, I tried to talk him out of it, because we had made plans for work the next day.

Q. Who tried to?

A. I had planned to work with Warden Arnold on the 22nd of October.

Q. Were you at Warden Arnold's home?

A. I was at Warden Arnold's home, and I had wanted to come over later, but the urgency of the matter caused me to change my plans, and I went over that night.

Q. What did you do then, after you got the phone call? A. After I got the phone call?

Q. Yes, after you finished the conversation.

A. I finished eating dinner and left. [149]

Q. Was this at Arnold's house?

A. At Arnold's house.

(Testimony of Alvin W. Elder.)

Q. Go ahead.

A. It was late. We had been working on the opening day of the duck season, and it was shortly before 10:00 that I left Bakersfield, and arrived in the vicinity of the Santa Clara River Game Preserve at the Mound Water Company shortly before 1:00 o'clock. I did not take the exact time at that time. The gate was locked and, not having a key, I had to leave my car there and walk over to the Santa Clara River Game Preserve.

Q. Did you enter upon the premises of the Santa Clara Club? A. I did.

Q. Would you tell us what happened after that?

A. I walked in along the east road to the approximate center. I had been there before, so I knew my way around.

Q. Can you refer to this diagram and tell us approximately where you mean?

A. The junction of the east road and that middle dike.

Q. You were on foot? A. I was on foot.

Q. What did you do then, if anything?

A. I walked west on the middle dike to No. 5 cross [150] dike. I then walked clear across that to the south road dike.

Q. Down here? A. Yes.

Q. And then where?

A. And then west again on the south road dike to cross dike No. 4, and then clear across that to the north road dike.

Q. Like that? A. That is it.

(Testimony of Alvin W. Elder.)

Q. Then where did you go?

A. As near as I can recall, that is about the directions that I traveled. Then I went west again to the next one, No. 3 cross road dike, back to the center dike, and I either turned east or west from there. Anyway, I was trying to cover as much of the area as I could on foot.

Q. And what did you do then?

A. Then I went on around in. I must have turned west, because I come down the next dike.

Q. This one?

A. No. I went back to the east then, to the north, back to the north dike.

Q. Then where did you go?

A. I circled that pond, going west from there and down to the center again, and then on out. [151]

Q. Then where did you go?

A. I went back to my car.

Q. Will you describe the condition of the area which you traversed on the premises of the Santa Clara Club?

A. Practically every foot of the way after I passed cross dike No. 5 on the middle dike——

Q. After you got to here?

A. Yes. There was grain broadcast or scattered quite widely on the center.

Q. Here?

A. Barley, yes, and along the cross dike, it was in very heavy dribbles where it appeared to me a sack had been carried over someone's shoulder, allowing barley to leak out where it was carried, with

(Testimony of Alvin W. Elder.)

here and there a little pile or so, approximately—I estimated at the time five or 10 pounds in each pile, but that is only an estimate.

At one place during the evening I found grain in the water. It looked like more than two sacks had been dumped in one place.

Q. Where was this place?

A. That was on the south dike near No. 4.

Q. Right in this area?

A. I am pretty sure that is where it was. Being night, I lost track, more or less, of which road dike I was on, but, to the best of my recollection, it was near No. 4 [152] cross dike and the south dike.

Q. Did you see anything else then at that time?

A. No, I didn't. I didn't get as far up as where the lima beans were. I found those at 7:00 something the next morning.

Q. Was there anyone else at the premises at that time?

A. No, I didn't see anyone else, or I didn't see any car, likewise, in the vicinity.

Q. Was there any wildlife present?

A. There were ducks feeding when I arrived, but I would say it was a relatively small number. I could hear them, but I couldn't see them.

Q. How can you tell? What sound makes you think they were ducks?

A. It is an unmistakeable sound to anyone who has listened to ducks. There is a whistling noise and the beating of wings. It is more the beat of

(Testimony of Alvin W. Elder.)

wings that I heard, more than anything else, and the splashes in the water.

Q. You have listened to a lot of ducks in your time? A. Yes.

Q. What did you do after you left the premises?

A. I returned to my car.

Q. When was the next occasion that you called on the premises of this club? [153]

A. Approximately 7:15 or 7:20 the next morning, or the same date.

Q. Did you have a flashlight when you made your nocturnal visit?

A. I did. I had a flashlight.

Q. The next morning at about 7:00 or 7:30, you say you visited again? A. Approximately.

Q. That was on October 22nd?

A. The same day.

Q. Will you tell us what occurred on that occasion? First, tell us who was present there.

A. At 6:00 o'clock in the morning, I had met Wardens Jack and Ernest Bedwell, John Spicer, and Les Edgerton, at the Blair Cafe in Ventura, where we had breakfast, and then we drove to the Mound Water Company, and one of the other boys had a key by this time, and we got through the gate and went on over to approximately an eighth of a mile, or maybe a little more, from the northeast corner of the club, where we waited in a clump of willows to determine whether anyone was hunting or not.

(Testimony of Alvin W. Elder.)

Q. I think you testified previously in the first part of your testimony that you had asked Mr. Spicer to get some other game wardens and meet you. Did you testify to that? [154]

A. No, I did not.

Q. I am sorry. Did you do that?

A. I suggested over the phone, yes, I said, "Get some others, get some of the other boys."

Q. What do you mean by "the other boys"?

A. I meant two or three other wardens.

Q. Was there some reason for your wanting to have two or three others besides Spicer and yourself?

A. I gathered from past experience we might run into influenial parties that would attempt to cause difficulties.

Mr. Irwin: Just a moment, Your Honor, I move to strike that out as highly improper.

The Court: It may go out.

Q. (By Mr. Johnson): But you did have four others with you? A. That is right.

Q. At 7:00 or 7:30, you proceeded to this area which you described near the northeast corner. Will you tell us what then occurred, if anything?

A. All of us watched with field glasses or binoculars the operations of the club, and it was just shortly after we got out of our cars that I observed a man, his head and shoulders, appear above a blind and a gun come out, and shoot at ducks flying over. During the court of the watching, I observed at least three ducks fall to various hunters. [155]

(Testimony of Alvin W. Elder.)

Q. What did you do then?

A. Well, after a short while, a few hunters appeared to be picking up their ducks, so we decided it was time to go on in. It was agreed I was to drive in with Warden Spicer and go clear around to the far side by the farm buildings and come in from that way, and the other three wardens were to wait there for a signal to come on in and to cover the east end of the club.

Q. What did you do then, after you decided this? Did you go on down to the premises with Warden Spicer?

A. Warden Spicer left with me in my car, and we drove south on east road, and we observed a hunter coming towards the road on the south dike.

Q. That is along here?

A. That is along there. We drove up to the fence at that point, and we both got out of the car, and the defendant Carty appeared carrying a shot gun and a couple of ducks in his hand.

Q. Do you know the defendant Carty?

A. I am acquainted with the defendant Carty.

Q. Would you point him out to the court and jury, where he is?

A. I didn't get the question.

Q. Would you point out to the court and jury where he is? [156] A. Yes.

Mr. Irwin: We stipulate it is Mr. Carty.

Q. (By Mr. Johnson): Go ahead. What then occurred?

A. Well, we were both standing at the gate wait-

(Testimony of Alvin W. Elder.)

ing as he walked up to us. He stopped, shook hands with Warden Spicer, and greeted me.

And I said, "I am sorry that you are here, Mr. Carty. I was hoping you would not be present."

He said, "Why"?

I told him that the ponds were too heavily baited with grain and that under the circumstances of last year, where he had been warned, that I couldn't overlook this this time, and asked him, also, if under those same circumstances, if they hadn't been expecting me. He stated that he had.

Q. Did you tell him that you had made an inspection?

A. I told him that I had inspected the ponds.

Q. What time did you tell him you inspected them?

A. I told him at 1:00 o'clock in the morning.

Q. Was there anything else said during that conversation?

A. Yes. The conversation took quite a while.

Q. Tell us what else you recollect.

A. Almost the first thing he told me was that they had an Attorney-General's decision as to the legal time up to which they could feed birds, feed ducks. [157]

Q. Did he say what that was?

A. He said it was up to—it was his understanding they could feed to within 72 hours of the shooting.

Q. Was he referring to the State Attorney-General? A. I assumed he must have been.

(Testimony of Alvin W. Elder.)

Q. Go ahead. What else occurred during that conversation? What else was said?

A. I explained to him after that that it was not a matter of the length of time that the feed had been put out before the ducks were hunted, it was the fact that the grain was there at the time the hunting took place that made the violation so important.

Q. Was anything else said by Mr. Carty?

A. Yes, quite a bit.

Q. What was that?

A. At one point, I started to write his name on a violation slip. He told me to arrest the club, not him, that he hadn't violated any law.

Q. Was anything else said that you can recall?

A. Not right this minute. I am sure there was more conversation, though.

Q. Pardon?

A. I am sure there was more conversation.

Q. But you can't recall it all right now?

A. No. [158]

Q. Was there anything said about whether a test case would be made or not?

A. Yes. Mr. Carty did make that statement.

Q. Go ahead and tell what statement he made.

A. Mr. Carty said that if we wanted to be technical, all of the gun clubs in the vicinity could be arrested, they all had been feeding prior to the season, and that he thought now was the time to make a test case out of this matter.

Q. What did you reply, if anything?

(Testimony of Alvin W. Elder.)

A. I advised him there had been numerous cases made and that I saw no reason for a test case. However, I informed him that was his right and privilege.

Q. Did you say anything else that you can recall? A. No.

Q. Pardon?

A. I can't recall anything else. [159]

* * *

Q. What then happened after this conversation?

A. Spicer and I both got back into my car, and we drove south to Gonzales Road, then west to the entrance, to the entrance of the farm, and then down to the gate where the club grounds—yes, approximately in that position.

Q. What occurred then, if anything?

A. We stopped my car and got out to observe the activities of the hunters with field glasses. In a moment, two hunters left the blinds and started toward us, one coming clear on in to where I was, to get and automobile to go back and pick up the ducks and the other hunter.

Q. Who was that one?

A. That was James Doud.

Q. Did you have a conversation with him at that time? A. No. [160]

Q. What then occurred, if anything?

A. He returned, picked up the other hunter and the ducks, and returned out into the club grounds.

Q. Who was the other hunter?

(Testimony of Alvin W. Elder.)

A. The other hunter was Mr. Maxwell.

Q. That was Mr. Maxwell? A. Yes.

Q. What occurred then? Did you have a conversation with them at that time?

A. Not until they returned to me.

Q. That is what I mean, when they returned to you.

A. When they returned to me, I stopped them and introduced myself and told them that the club was heavily baited with grain, and that they were in violation. I asked to see their hunting licenses and duck stamps, which were produced. I wrote the information needed on my pink violation slips.

Q. Had you written out a pink violation slip for Mr. Carty previously?

A. I had started it and hadn't finished it.

Q. You say you wrote out a pink violation slip on Mr. Doud and Mr. Maxwell?

A. That's right.

Q. Did they have any ducks with them?

A. They brought in 10 ducks and one cackling goose between [161] the two of them.

Q. One cackling goose?

A. One cackling goose.

Q. What then occurred?

A. Mr. Maxwell said that he smelled something rotten in the whole deal.

I asked him what it was. Mr. looked at Mr. Doud and said, "Jack White."

Q. And then what?

A. I explained to him Jack White hadn't any-

(Testimony of Alvin W. Elder.)

thing to do with the matter, that this was a routine inspection of the ponds, and that I had found the grain there, that I had been on the ponds during the night and had found much more grain than should have been there.

He stated that he had put out grain shortly before, but it was cleaned up. He said, "I just came in from my blind. I have not seen a bit of grain."

I said, "Mr. Maxwell, when I walked through these ponds early this morning, I could have scooped three or four or more bucketsful of samples from places where I wouldn't have to get out and scratch for the grain, the grain was in heaps and piles."

He said, "That couldn't have been, because they had stopped feeding at least 10 days before."

I offered him a copy of the federal regulations.

Q. What federal regulations?

A. The Migratory Bird Treaty Act regulations. He stated he had several copies of those in the office and waved it to one side. [163]

* * *

Q. Mr. Elder, this morning you were relating the details of a conversation between yourself and Mr. Maxwell at the time you encountered him on the premises of the Santa Clara Hunting Club. Would you tell us further what was said during that conversation?

A. Well, that about covered it. There was one remark made, I believe, by Mr. Maxwell—Mr. Doud didn't have very much to say—about a test case being made of the matter.

(Testimony of Alvin W. Elder.)

Q. What did you say in answer to that, if anything? [164]

A. I don't recall answering that statement. I don't recall that.

Q. Did you take any birds from Mr. Maxwell and Mr. Doud?

A. I took five ducks from each and one cackling goose.

Q. That's right. How did you know they were ducks? That may be a silly question. They were, from your experience, ducks?

A. These were ducks.

Q. What kind were they?

A. They were pintail ducks, widgeon, and one redheaded duck.

Q. Did you make out violation slips on those?

A. I made out pink violation slips on the two of them and advised them at the time I made those slips out that further shooting on this property would result in a separate charge.

Q. What did you do, if anything, after writing out the violation slips on Messrs. Maxwell and Doud?

A. After that was done, I put their ducks in my car and drove farther out onto the south road dike.

Q. How far out did you drive?

A. Approximately where the curved portion joins the main dike at cross dike No. 2.

Q. What did you do then, if anything? [165]

A. Well, we had to—incidentally, I had forgotten to give my signal to the other boys to close in,

(Testimony of Alvin W. Elder.)

but after driving out to dike No. 2 and parking the car, we stayed there a moment or two, watching, while hunters started towards us.

Q. Started what?

A. Hunters started towards us.

Q. Hunters came towards you and Mr. Spicer?

A. Yes, Warden Spicer and I.

Q. Go ahead.

A. We were waiting in front of my car just east of cross dike No. 2, and men were coming in in ones and twos from their various blinds.

Q. Did you talk to them when they came in?

A. I talked to them when they met us, and in the meanwhile Mr. Carty had gone to the hunters on the extreme east end of the club and was walking out with them towards the east road.

Q. Could you observe all this?

A. I could, yes.

Q. Did you observe Mr. Carty going in the direction which you have described? A. Yes.

Q. What further did you observe in that regard, if anything?

A. Well, I observed Mr. Carty and the hunters going to the east road on down the middle dike.

Q. Anything else?

A. They were carrying their birds and their shotguns.

Q. Did you see any other persons in that area?

A. At about the time that they were leaving, Wardens Jack and Ernest Bedwell and Les Edgerton had driven up to the middle dike at the east

(Testimony of Alvin W. Elder.)

road. Having failed to signal them, they were a little disconcerted when they saw the hunters leaving by that way. There was a car parked on the east road.

Q. Had you seen Warden Edgerton before that after you left the clump of willows?

A. No, I didn't see him until he joined us while I was talking to these other hunters that were coming in. I started to say these hunters were coming in in ones and twos from the blinds towards my car, and we met them at about the intersection of cross dike No. 3 and the middle dike.

As they arrived, I checked their hunting licenses and the duck stamp and wrote the information I needed on violation slips, and told them to leave their ducks, that the ducks were being confiscated as evidence.

I informed them, as I had Mr. Carty and Mr. Maxwell and Mr. James Doud, that further shooting would result in separate charges, that the ponds were very heavily baited with grain. In fact, they were standing in grain that was abnormally thick at the time that I pointed that out to them, and there was very little discussion at the time, as I recall it, [167] with these five men.

I explained the regulations to them, and most of them took it in good part and left, going to their cars, walking down the back—up, I should say, the south road dike towards the farm buildings where their cars were parked.

(Testimony of Alvin W. Elder.)

Q. Were there any guns evident?

A. Each man was carrying a shotgun.

Q. And the ducks they had, what happened to them, if they had any?

A. They were left at the point where we met them.

Q. In what state were they left?

A. As they took them from their hunting coats.

Q. What did you do then with the ducks?

A. We carried them back a short distance toward my car. While talking to these men, Warden Edgerton drove clear around from the point where he and the two Bedwells had intercepted Mr. Carty and the other four hunters, and drove up to the point where were were talking to the five hunters I had stopped, and asked what was wanted with these men, if I wanted them to bring them all back up to where I was.

Q. Edgerton asked you that?

A. Warden Edgerton asked me that. I told him that it was enough to take their names and addresses and seize their ducks, and report back to me.

Q. Did you make out violation slips on them?

A. I did when the Wardens Bedwell returned to the field later and gave me the names and addresses I had requested.

Q. Of the defendants here in court, how many, if any, were cited upon a pink violation slip at that time?

A. It is not exactly a citation. It is just a memorandum of the facts of the violation.

(Testimony of Alvin W. Elder.)

Q. In regard to how many were there memorandums? A. Nine.

Q. Were all nine cited at that time of the day?

A. No. There were seven at that time and two observed later in the afternoon.

Q. Who were the two later in the afternoon?

A. That was Vincent Doud and Mr. Farrell.

Q. What else did you do at that time, if anything, after you had written out the slips?

A. After I had written out the slips, why, the five hunters that I had been talking to departed, walking back through the lima beans towards their car, and the Wardens Edgerton and the two Bedwells had started in on the south—or the middle dike from the east road and met us approximately on cross dike 4 and south road dike, where we then dispersed, and each tried to cover separate parts of the club as to——

Q. Did you inspect the premises at that time, the premises of the club?

A. I did. I inspected nearly all the premises I hadn't covered the night before.

Q. Will you state to the court and jury what you observed, please?

A. In the first place, when I had driven out on the south road dike, I observed wide paths of lima beans almost covering the entire width of the road for several yards, probably 75 feet.

Q. Go ahead.

A. Probably a little more than 75 yards. These varied from just covering the surface to a couple

(Testimony of Alvin W. Elder.)

of inches deep, and maybe five or six feet wide in most places. Along the fringe of the lima beans was scattered barley, and out into the water on the pond that would be formed by the cross dikes 2 and 3 and the south road dike and the middle dike, that pond bounded by those dikes I have described, there was a considerable amount of grain in the water. I couldn't say—it was more than a sackful, anyway.

* * *

Q. (By Mr. Johnson): This was in the water?

A. This was in the water in that vicinity.

Q. Mr. Elder, I hand you a photograph marked Government's Exhibit No. 4 in evidence, and ask you if that is the [170] area or if that substantially portrays the scene which you have just described.

Q. This is a scene at another spot.

Q. This is another spot? A. Yes.

Q. Did you happen to see that particular scene?

A. I did.

Q. Does that substantially represent what you saw at that time? A. That is it.

Q. What is that material on the ground in the foreground and appearing to be something out into the water, if you know? A. That is barley.

Q. Did you examine it? A. I did.

Q. Did you pick it up? A. I did.

Q. Did you find the barley any place else on the premises in that manner?

A. I found barley in practically every foot of the premises. I qualify that, with the exception of

(Testimony of Alvin W. Elder.)

cross dike No. 5. I did not find any barley on that.

Q. But in all other parts of the premises?

A. In all other parts of the premises, yes. [171]

Q. You did find evidence of the barley?

A. I did.

Q. What about lima beans, how were they distributed, if they were?

A. The lima beans were spread—well, my thought at the time was that the tail gate of a dump truck had been cracked open a couple of inches and backed down the road, spreading them quite evenly.

* * *

The Clerk: Government's Exhibits 11-A, B, C, D, E, F, and G for identification.

(The documents referred to were marked Government's Exhibits Nos. 11-A, 11-B, 11-C, 11-D, 11-E, 11-F, and 11-G for identification.)

Q. (By Mr. Johnson): What is your answer as a result of looking at those?

A. Those pictures substantially show the conditions on the Santa Clara River Game Preserve on October 22, 1949.

Q. Referring to Government's Exhibit 3 in evidence, what is this bird on the extreme right?

A. That is a cackling goose.

Q. Was that taken from the hunters, too?

A. That was taken from the first two that came in, Mr. James Doud and Edward Maxwell.

Q. Referring to Government's Exhibit No. 5, apparently it is a picture of yourself. What are you

(Testimony of Alvin W. Elder.)

doing in that particular picture, if you recall?

A. In this picture, I am scooping a handful of lima beans into an aluminum cup.

Q. Referring to Government's Exhibit No. 7, what are you doing in that particular picture?

A. I had cut the top off a one-quart milk carton and was filling it with lima beans and barley, which was mixed at this particular point.

Q. Where was that particular point, if you recall? [173]

A. That particular point was in front of the automobile which was parked approximately across cross dike No. 2—it was between cross dike No. 2 and cross dike No. 3.

Q. Did you take any other samples besides those two in the picture?

A. Yes. I took a sample of the barley only with the lima beans in it.

Q. What did you do with those samples after you took them?

A. I put them in the car, and when I returned to Los Angeles, I identified them and wrapped them up.

Q. After you got back to where?

A. To Los Angeles.

Q. Where in Los Angeles did you wrap them up?

A. In my office.

Q. What did you do with them besides wrapping them up?

A. I identified them with a description of what was in each package.

(Testimony of Alvin W. Elder.)

Mr. Johnson: The government offers for identification three objects, one of which is a tin cup with a paper shield over it; the second of which appears to be a paper bag with a slip of paper and writing attached to it; and the third of which appears to be a milk carton with a paper attached to it, some of which has writing on it. [174]

The Clerk: Government's Exhibit 12?

Mr. Johnson: And may we have them marked as 12-A, B and C, your Honor?

The Court: It is all right with me, or you can make them 12, 13 and 14.

Mr. Johnson: That is all right with me.

The Clerk: Government's Exhibits 12, 13 and 14 for identification.

(The articles referred to were marked Govment's Exhibits Nos. 12, 13 and 14 for identification.)

Q. (By Mr. Johnson): Now, Mr. Elder, I hand you an object marked Government's Exhibit No. 12 for identification, and ask you if that is the tin cup in which you took the samples which you have described in your testimony. A. It is.

Q. Is that sealing job on there your job, as you have testified?

A. That is the way I sealed it.

Q. Is that writing on the outside yours?

A. That is my handwriting.

Q. This was done, as you have testified, when

(Testimony of Alvin W. Elder.)

you returned to your office. A. That is correct.

* * *

Q. (By Mr. Johnson): Would you go ahead and open it up? You put it together.

(Witness complying.)

Mr. Johnson: Now, may the record show that the witness has torn open the seal of this cup?

The Court: The record may so show.

Q. (By Mr. Johnson): The material in there appears to be—well, what is that material in there?

A. That is what I would describe as cull lima beans. It is small lima beans and split, cracked and otherwise unmarketable lima beans.

Q. Is there anything else besides the lima beans in there?

A. There is some scraps of dirt.

Q. Wouldn't this be barley, this particular piece here? A. Yes, that is.

Q. Are those the samples—

Mr. Irwin: May the record show that government counsel picked out one kernel of grain from Exhibit 12?

Q. (By Mr. Johnson): Mr. Witness, can you see any other kernels of grain in Government's Exhibit No. 12 for identification? Are there others?

A. Yes, there are several others.

Q. It is mixed, isn't it? [176]

A. Yes, but that sample is intended to be straight lima beans. The mixed sample is in another package.

(Testimony of Alvin W. Elder.)

Q. Is that one of the packages that you did take, as you testified? A. That is correct.

Q. That is the one pictured in the photograph marked Government's Exhibit No. 5 for identification? A. That is correct.

Mr. Johnson: The government offers it in evidence as Government's Exhibit No. 12, your Honor.

The Court: It may be received.

Mr. Irwin: Just a moment. May I ask one or two questions, please, out of order?

The Court: All right.

Mr. Irwin: This was on Saturday morning, you say, that you took this sample?

The Witness: Yes.

Mr. Irwin: When did you return to your office?

The Witness: About 3:00 or shortly after 3:00 Saturday afternoon.

Mr. Irwin: Saturday afternoon?

The Witness: Yes.

Mr. Irwin: Before you returned to Bakersfield?

The Witness: That is correct. [177]

* * *

The Court: It may be received.

(The article referred to was received in evidence and marked Government's Exhibit No. 12.)

Q. (By Mr. Johnson): Now, Mr. Elder, I hand you an object marked Government's Exhibit No.

(Testimony of Alvin W. Elder.)

13 for identification and one marked Government's Exhibit No. 14 for identification, and ask you to state what those are, if you know.

A. No. 13 is a sample of barley picked up on south road dike.

Q. Under the circumstances to which you have already testified?

A. Under the circumstances to which I have already testified.

Q. And on that particular occasion?

A. It was on the morning of the 22nd of October, 1949.

Q. And what is No. 14?

A. No. 14 is a sample of lima beans and barley mixed at a point where the mixture was quite obvious.

Q. And No. 14, would that have any relation to the scene photographed in Government's Exhibit No. 7?

A. That is correct. That is where I was picking up my sample, along the fringes of the lima beans, where the barley was pretty heavy and scattered.

Q. Would you please open up No. 13 and No. 14, please? Is that your writing on the outside of each?

A. That is my writing.

Q. What is this material, if you know, contained in the objects which you have just opened, No. 13 for identification?

A. That is barley.

Q. Is that the barley sample that you took under the conditions to which you testified?

(Testimony of Alvin W. Elder.)

A. That is.

Q. And on that particular occasion?

A. That is correct.

Mr. Johnson: The government offers No. 13 in evidence, your Honor.

Mr. Irwin: One moment on that, your Honor. I notice the identification on this, which was removed before the bag was opened, states that it was taken on the south road dike.

The Witness: That is correct.

Mr. Irwin: So that is where that is.

The Witness: That is correct. That is what I testified to.

The Court: It may be received.

(The article referred to was received in evidence and marked Government's Exhibit No. 13.)

Q. (By Mr. Johnson): Would you open the next object, the one marked Government's Exhibit No. 14 for identification. (The witness complying.)

Q. What does that particular object contain?

A. This represents a sample of lima beans and barley picked up together.

Q. Is this writing on the outside of the package your writing. A. That is my writing.

Q. I notice it says, "Barley and lima beans taken from south road dike of the Santa Clara River Game Preserve, October 22, 1949, A. W. Elder."

A. That is correct. That is my writing.

Q. Is that the sample you took at that time?

(Testimony of Alvin W. Elder.)

A. It is.

Q. And that is portrayed in the photograph marked Government's Exhibit No. 7 in evidence?

A. That is correct.

Mr. Johnson: The government offers this in evidence, your Honor.

Mr. Irwin: No objection.

The Court: It may be received.

(The object referred to was received in evidence and marked Government's Exhibit No. 14.) [180]

* * *

Q. (By Mr. Johnson): Mr. Elder, I hand you some documents marked Government's Exhibits 11-A through 11-G for identification, and ask you if those are the violation slips which you testified you issued on the morning of October 22 to the hunters coming off the premises of the Santa Clara Hunting Club.

* * *

Q. (By Mr. Johnson): Mr. Elder, did you give copies of those slips to anyone?

A. No, I did not.

Q. Did you write these out on that particular occasion?

A. These slips were written by myself on this occasion.

Q. Are these the slips that you are required in your position to write out in the ordinary course of

(Testimony of Alvin W. Elder.)

business [181] whenever you make a citation for a violation of the federal game laws?

A. When we have a case that we think will go into Federal Court and, quite often, cases that we will take into State courts, we fill out this pink violation slip, which gives nearly all the facts we would need to file a complaint on the violation.

Q. Were those wirtten by you on the morning of that day?

A. These were written by myself on the 22nd of October, 1949.

Q. How soon after you notified each individual hunter whom you did notify of an apparent violation, did you write out each of the slips?

A. In the case of the eight hunters that I contacted myself, I made the slips out as I talked to them, as I got the information, such as the name and address from their hunting licenses.

Q. Were these so made out?

A. With the exception of the five men that left by the east end.

Q. What is the purpose of these slips, if you know?

A. To get the information that we want for our records and for court action later. [182]

* * *

After you had taken the samples, did anything else occur at that time?

A. Well, while taking the samples, and before and after taking the sample, why, pictures or photo-

(Testimony of Alvin W. Elder.)

graphs were being taken of the vicinity and of the act of picking up the samples.

Q. And those are the photographs marked Government's Exhibits Nos. 2 through 9, which you have examined. A. That is correct.

Q. Did you subsequently, on the same day, have occasion to call at the premises of this hunting club?

A. Yes. Both Wardens Bedwell and I returned shortly after 1:00 o'clock on the afternoon of the 22nd to the Santa Clara River Game Preserve.

Q. Could you tell us what occurred on that particular occasion?

A. We observed three parties out on the club grounds. Not knowing who they were, we drove in on that southwest corner again, and as we got to the gate, a party came to the gate, and I asked him if he was hunting.

He said, "Yes. I came in for my decoys."

Q. What gate was this now? [186]

A. The gate at the southwest corner, approximately where your pencil is.

Q. Who was that particular person?

A. That man was Vincent Doud.

Q. And he is present in the courtroom?

A. He is present in the courtroom.

Q. And were there any others?

A. There were two others.

Q. Who were they?

A. One was Raymond Farrell, and the other was a minor, a juvenile, who is not being prosecuted.

(Testimony of Alvin W. Elder.)

Q. Did you have a conversation at that time with them?

A. Yes. I asked Mr. Doud if he was hunting, and I asked him if he killed any ducks.

He said, "Yes. I have three on the pond. I am taking my decoys out now."

Q. Now, who was this?

A. Mr. Doud.

Q. Go ahead.

A. Ernie and Jack Bedwell and myself drove out approximately to where we had parked in the morning, near cross dike No. 2, and I got out of the car, and we separated, I going with Vincent Doud to where he said his ducks were, the blind he had been shooting in which, as I recall it, was on cross dike No. 2. [187]

I explained to him the reason for all of this, and he agreed with me there was a lot of grain there.

Q. This is Mr. Doud?

A. Mr. Doud.

Q. Did Mr. Doud say anything else, or did you say anything else to Mr. Doud?

A. I explained to him about the regulations, of course, went completely through that, and advised him other members of the club had been apprehended in the forenoon.

He did make the remark it was funny he had two brothers there in the morning and they hadn't got word to him.

Then I walked over to where Mr. Farrell and his son were, and the boy said he had not killed a duck, and upon inquiry of his age, I informed him I would make a memorandum of it, but he would not be—

(Testimony of Alvin W. Elder.)

the report of his violation would not be turned over to the United States Attorney as the others would be.

Mr. Farrell admitted to two ducks and turned them over to me, and I again went through the whole explanation of what it was all about.

Q. Was there anything else by way of conversation at that time?

A. Well, it was chiefly along the lines of regulations, the Migratory Bird Treaty Act regulations. I dont recall any other. [188]

Q. What did you then do? A. Well, I—

Mr. Irwin: Pardon me. I was waiting until counsel got through. I think I should at this time instruct the witness any statement made by this Mr. Vincent Doud outside of the presence of the other co-defendants strictly should be considered against him alone.

Mr. Johnson: We will stipulate to that.

Q. What next occurred, if anything?

A. Well, we left—I took their five ducks and put them with the others I had in the back seat of my car, left, and drove over to where the Bedwells' cars were, and I left them then and drove straight into Los Angeles, because I wanted to get the ducks into storage and to mark the evidence.

Q. From the defendants here, how many ducks were taken altogether that you know of?

A. The defendants present?

Q. The defendants here in court, yes.

A. Thirty-six ducks and one goose.

(Testimony of Alvin W. Elder.)

Q. Thirty-six ducks and one gooose?

A. By that, I arbitrarily assigned Mr. Robert Maulhardt two ducks. It appeared when he and his partner came in, there were five ducks between the two of them. They agreed they had both shot, and neither one would claim how much either one had shot, so I told them that is what I would do. [189]. That was just a sort of arbitrary decision on my part. I will admit that.

Q. Do you recall what kind of ducks these were? Let me put it this way. How many different types of ducks were represented in the 35?

A. Principally, there were sprig or pintail.

Q. You mean otherwise known as pintail?

A. Pintail and Widgeon, redhead, green wing teal, and shoveler, also known as spoonbill.

Q. And then the one cackling goose?

A. The one cackling goose.

Q. Are all of those migratory waterfowl?

A. They are all migratory waterfowl.

Q. And they are ducks?

A. They are ducks.

Q. Except for the goose. What did you do with these ducks that you confiscated?

A. I placed them in my evidence locker at the Los Angeles Ice & Cold Storage plant.

Q. Do you have access to them at this time?

A. Yes.

Q. And they are in that place at this time?

A. They are there.

Mr. Johnson: The government wishes to make an offer of evidence. Should counsel for the defense

(Testimony of Alvin W. Elder.)

require them, we [190] could bring these frozen ducks and one goose into court.

Mr. Irwin: It is not necessary. I will stipulate the defendant had the ducks and the other.

Mr. Johnson: And the goose.

Mr. Irwin: That's right.

* * *

Q. Now, Mr. Elder, from your experience as a game warden, which I think you testified goes back to 1936—

A. That is correct.

Q. —do ducks eat lima beans?

A. It is my belief that ducks eat lima beans, especially if they are soaked and wet, and if they are hungry. Ducks would leave lima beans to eat barley at any time, but it is pretty well known among gun clubs or hunters that hunt in that area that ducks will eat lima beans and have done so.

Q. What about barley? Will they eat barley?

A. Barley is one of their principal foods.

Q. What about geese, do they like lima beans?

A. Geese, I am quite sure, are fond of all legumes, peas, beans, etc. [191]

* * *

The Court: You testified that these ponds were too heavily baited, too heavily baited. Is it legal to bait a duck pond at all?

The Witness: No. That was probably an error on my part. I did not intend to leave that impression at all, because any baiting is illegal.

(Testimony of Alvin W. Elder.)

Cross-Examination

By Mr. Irwin:

Q. You say that any baiting is illegal?

A. Any baiting is illegal.

Q. Do I understand you by that to mean feeding at any time on clubs is illegal? A. No.

Q. There is a difference?

A. There is a difference between baiting and feeding.

Q. In other words, there is nothing illegal about feeding before the shooting season?

Mr. Johnson: Your Honor, again I must object to that question, which has been asked before. I think that is a matter of law which only this court can decide, and counsel for the government has cited cases directly in connection with them.

The Court: Overruled. [192]

* * *

A. There is nothing illegal about feeding before the shooting season, providing that hunting is not carried on as a result of that feeding.

Q. As a matter of fact, all the duck clubs feed, do they not?

A. No. I would say a very small percentage of them do.

Q. Did you check any of the other clubs immediately around this Santa Clara Game Preserve?

Mr. Johnson: I object to any testimony as to other clubs, not that we don't feel in all fairness to the defendant it might not come in, but it is going to

(Testimony of Alvin W. Elder.)

take us off into a lot of collateral issues, and we have taken up a lot of time already. What may have happened at Point Magu and Ventura or any other club is not important.

The Court: This is cross examination. Overruled.

Mr. Johnson: I know, but I am objecting on the basis it is not a subject to discuss on cross examination and, furthermore, it is collateral and irrelevant.

The Court: The witnesses in this case have been talking about baited ponds.

* * *

A. I have.

Q. In connection with the 1949-1950 season?

A. In connection with the 1948-1949 season. That was a year previous. The 1949-1950 season, I discussed it only with the keeper at the Ventura County Club and at the Point Magu Club. I walked out onto the blind while waiting for the keeper there to bring in some hunters, and our party was waiting there talking to other hunters. No grain was found.

Q. We will get along very rapidly if you will just answer my question.

Mr. Irwin: I move to strike out the last few lines of the answer as not responsive.

* * *

Mr. Irwin: I want the answer to be yes or no.

The Court: The part of the answer, "no grain was found," may go out.

Q. (By Mr. Irwin): Mr. Elder, all I am trying to do is to get the facts. I am not trying to confuse

(Testimony of Alvin W. Elder.)

you. You stated very few of the clubs feed. What I am coming to is to ask you if you know whether or not the Ventura Gun Club feed.

A. I have been told they do.

Q. Do you know whether or not the Point Magu Club feeds? A. I have never seen them.

Q. Do you know whether the new Gentry Club which is adjacent to the Senta Clara Game Preserve, feeds? A. I do not.

Q. You don't know? A. I do not know.

Q. So when you said a litle while ago that very few of the clubs feed, you didn't know what you were talking about, did you?

A. I think I do.

Q. Didn't you just tell me you didn't know what these clubs did right around there? How can you say they did or they did not if you don't know what they did?

A. To my knowledge, they weren't feeding.

Q. I am sure you want to be fair, Mr. Elder. Now, with reference to these beans being duck feed, you know Mr. Macklin, who is head of the Southern California Division of the Fish and Game?

A. I do.

Q. You had a conversation with him, did you not, after the events of October 22nd, concerning what had happened up at Oxnard?

A. I did.

Q. In the course of that conversation, did you not say to him that the beans were not duck feed, in your opinion?

(Testimony of Alvin W. Elder.)

A. I have never said that.

Q. You know Mr. Arnold, who is the State Game Warden? [195] A. I do.

Q. In fact, you were at his home when you got these telephone calls from Mr. Spicer to go over to Oxnard, weren't you?

A. That is correct.

Q. You met with him again on Sunday, the 23rd?

A. That is correct.

Q. Did you not tell Mr. Arnold when you returned on Sunday that there were some lima beans there, but that the ducks would not eat lima beans?

A. I did not.

Q. You are positive of that?

A. I am positive of that.

* * *

Q. In your statement just before your direct examination was concluded, you said you believed the ducks would eat [197] lima beans, especially if they were wet. Were the lima beans wet up there?

A. No.

Q. They were not?

A. Not until the rain has come.

Q. Is there any evidence of it having been raining? Were they moist?

A. They were not at the time. [198]

* * *

Q. (By Mr. Irwin): Mr. Elder, adverting to a different subject for the moment, I understood you to state that from—of these nine defendants, you figured, as you put it, arbitrarily, you took a total

(Testimony of Alvin W. Elder.)

of 36 ducks and one goose? A. That is right.

Q. As far as bag limits are concerned, nine would have been entitled to 45, so there is no question of the bag, or anything like that?

A. No, there is no question of being over the limit.

Q. This morning on your direct examination, I understood you to say that when you were out there at 1:00 o'clock in the morning, you were dependent on a flashlight, is that correct?

A. I had two flashlights. [199]

Q. You had what?

A. I had two flashlights.

Q. With the aid of these flashlights, you stated that you placed them in the water, and you could see grain on the bottom, which you estimated to total two bags, is that correct?

A. I did not say I flashed them in the water. I walked into the water, walked into the grain, and discovered it that way. I might not have mentioned it that way, but that is what I meant.

Q. What were you wearing?

A. I was wearing light worn-out shoes, oxfords.

Q. And you could tell from what your feet traversed that you were walking over a couple of bags of grain, is that correct?

A. I could tell when I walked into it that it was something different from the mud and grass, and so forth, that was growing in the pond.

Q. Just you could tell it was something different?

A. That's right.

(Testimony of Alvin W. Elder.)

Q. Was it that difference that prompted you to give the direct testimony that you observed two bags of grain?

A. Yes. I observed them with the flashlight.

Q. Under the water?

A. Not all of it. Some of it was out of the water. [200]

Q. Actually, you don't know what was under the water from what the soles of your feet touched, other than that it was not even, isn't that about the size of it?

* * *

A. No. My recollection is that I could see enough through that shallow water with a flashlight after I discovered it to make an estimate or a guess.

Q. Did you do anything else?

A. I felt of it.

Q. What is that? A. I felt of it.

Q. You did. In what way did you feel of it?

A. I picked up a handful.

Q. One handful? A. Yes.

Q. On that basis, you give it as your figure that there were two bags? A. That is right.

Q. Let's use this Government's Exhibit No. 1. Will you just show me where it was that you walked upon the waters there?

A. I walked into the water from various points along [201] the dike.

Q. What point was it?

A. It was approximately this vicinity here.

(Testimony of Alvin W. Elder.)

Q. You have pointed to the intersection of dike No. 5 and the south road? A. No. 4.

Q. No. 4 and the south road?

A. That is right.

Q. In other words, are you referring to the same location as is represented by your Exhibit No. 4, which picture was taken the following day? I think that was located at the same place.

A. I am quite sure this represents approximately what I saw that night.

Q. The previous night? A. That is right.

Q. You said you estimate there were two bags there. You have told us in your direct examination what you said was grain mixed with the barley, and so on, was there. What did you estimate was the total amount of grain on those 40 acres?

A. Well, my estimates ran from a few ton to quite a few ton. I recall at one time, after looking it over in daylight, that I thought there was between two and two and a half tons of barley, and probably eight or ten tons of lima beans. After the pictures had been enlarged, I revised that downward [202] slightly.

Q. As a matter of fact, didn't you first tell Mr. Paul of the Ventura Press that there were 15 tons of grain there?

Mr. Johnson: If your Honor please, I am going to object to what statements were made to the press by the witness. It has nothing to do with the issues of this case. It occurred subsequent to the

(Testimony of Alvin W. Elder.)

21st of October, and we don't wish to try the case in the newspapers.

Mr. Irwin: I want to show various inconsistent statements, your Honor, going to his credibility.

The Court: Overruled.

* * *

The Witness: No.

Q. (By Mr. Irwin): By the way, when was it you told Mr. Macklin, how soon after October 22?

A. I think it must have been about the 25th or 26th.

Q. In response to Mr. Macklin's inquiry, didn't you tell him there were four tons of grain?

A. No.

Q. On the Sunday after the 22nd, which would have been the 23rd, when, as you have testified, you returned to the vicinity of Bakersfield and again met Mr. Arnold, didn't Mr. Arnold ask you what you had found over at the Santa Clara [203] preserve, and you told him three or four buckets of grain? A. No.

Q. One of the other witnesses, Mr. Elder, I believe it was, Mr. Spicer—you have been in court throughout the trial—was asked whether or not he saw any evidence of cows having been on the preserve. I understand from you that you were present, of course, when the pictures were taken, Exhibits 2 to 9, inclusive. I want to direct your attention to Exhibit 8 which, as I understand it, is looking from dike 3 towards dike 2, where there are two automobiles, one of which is your car. I direct your attention to various dark splotches all

(Testimony of Alvin W. Elder.)

along there. Do you recall, as a matter of fact, seeing that, and that was in fact cow manure?

A. It was not.

Q. No cow manure there?

A. Not that I ever saw.

Q. That afternoon when you went back and these three people were there that you saw, no one of them was included in the group that you had stopped that morning? A. No.

Q. In other words, you don't want the jury to think any one of these people you stopped in the morning had returned that afternoon?

A. No, I do not.

Q. These were three separate people from the group you [204] stopped in the morning?

A. That is correct.

Q. I believe you testified that when you went over the dikes sometime in the night, around 1:00 o'clock in the morning, you saw samples of grain, which made it appear to you someone had gone along with a sack with a hole in it over his shoulder; is that your testimony? A. That is correct.

Q. If it appears that one of the defendants in this case caused some grain to be spread with a carry-all approximately 10 days before the season opened, would you say that the grain that you saw was evidently distributed at a later date and in another manner?

A. I could not testify what the date was it was put out.

Q. Precisely. That is compound. This grain

(Testimony of Alvin W. Elder.)

that you saw on the night of the 22nd, in your opinion, had been dropped out of a sack by somebody walking along?

A. That was given as my opinion. I can't say. I didn't see the man doing it.

Q. You have no way of knowing who did it, whether it was one of the defendants?

A. That is right.

Q. Or somebody else that might want to embarrass them? You don't know?

A. That is correct. [205]

Q. My attention has been called—so that I may in no way mislead you—that the question I asked you about your statement to Mr. Paul of the Ventura Press, used the term 15. I understand that I should have asked if you did not tell him 10 to 15 tons? A. That is correct.

Q. You did tell him that? A. I did.

Q. Your own testimony now is that you revised that downward to 2 tons?

A. No, I didn't say that. I did not say that.

Q. What do you say, sir?

A. I can't make an exact estimate of something like that. I said after I had reviewed the pictures in their enlarged form, I had revised it downward, but I would still think several ton.

Q. You do deny having told Mr. Arnold that you found about three or four buckets on the preserve?

A. If that was said, it must have been said, as I

(Testimony of Alvin W. Elder.)

had said to Mr. Maxwell, that I could scoop up three or four buckets at several points.

Q. My question is, so there won't be any dispute about it, did you or did you not tell him that the quantity of grain you found was three or four buckets on that preserve? A. I did not. [206]

Redirect Examination

By Mr. Johnson:

Q. Mr. Elder, some reference was made in cross-examination to whether or not you knew other clubs in your district were feeding. I think you said you didn't think they were. Is that it?

A. I replied—I believe the question was not exactly like that.

Q. Well, at any rate, I think Mr. Irwin asked you whether it was not true most of the clubs were feeding. A. That is correct.

Q. And your answer is no, it was not true; is that it? A. That is correct.

Q. How many clubs are there in the district for which you are responsible?

A. Approximately 175.

Q. Were you referring to all of those clubs?

A. I was.

Q. Or just those in Ventura County?

A. I was referring to the club in my district, the club I am more or less familiar with.

Q. And responsible for in regards to the regulations? A. Yes.

(Testimony of Alvin W. Elder.)

Q. And your testimony was, from your experience, most [207] of those clubs do not feed?

A. That is correct.

Q. There was some questioning on cross-examination with regard to a conversation between yourself and Mr. Arnold, in the one instance, regarding lima beans, and in the second instance with a Mr. Macklin regarding lima beans. Do you wish to tell the substance of that conversation, or would you tell the substance of those conversations? First, tell us about Mr. Arnold.

Q. I don't recall discussing lima beans with Mr. Arnold, other than I told him there were several tons of lima beans on the property.

Q. Did you use the phrase, "three or four bucketsful," during that conversation?

A. At no time.

Q. That is Mr. Arnold. What about Mr. Macklin? Did you have a conversation with him about it?

A. The conversation with Mr. Macklin about lima beans was as to their use as duck feed, whether they were duck feed or not, and we agreed that lima beans would not seem an important duck feed, and I think Mr. Macklin agreed with me under certain conditions lima beans would be used and could and would be duck food, but it was not the way the question was phrased to me.

Q. Did you discuss with Mr. Macklin on that occasion [208] or any other occasion the amount of

(Testimony of Alvin W. Elder.)

grain that you had seen on these premises of this Santa Clara Hunting Club? A. Yes.

Q. How much did you tell him you had seen?

A. At first I told him, as I stated to the defense counsel, that there was from two to two and a half tons of barley and possibly eight or ten tons of lima beans.

Q. And you revised that downward?

A. I have revised that downward. The discussion with Mr. Macklin was in the upper brackets.

Q. Did you ever revise it downward in a conversation with Mr. Macklin after that?

A. No.

Q. Mr. Elder, at my request, did you secure a wild duck within the past 10 days and observe its feeding habits? A. I did.

Q. Could you tell us the results of that observation? Excuse me. Strike that. Where did you keep this duck? A. At my home.

Q. What kind of a duck is it?

A. It is a wild mallard.

Q. Where did you get it?

A. From the Waugus Land Company at Antelope Valley.

Q. Where did you keep it?

A. In a pen with a small concrete pond. [209]

Q. Have you been feeding it?

A. I have been feeding it.

Q. Did you observe its feeding habits?

A. I did.

(Testimony of Alvin W. Elder.)

Q. Particularly with respect to lima beans, what did you observe?

A. At first I fed it lima beans and barley, figuring I couldn't let the poor thing starve. I figured it would eat the barley, if it didn't eat the lima beans, but from my first observation both lima beans and barley were gone, and so gradually I cut down the amount of barley, and now it is eating lima beans solely.

Q. You put it in a dish?

A. I put it in a dish and counted the number of beans. I am using baby or lima beans which are about as large as my little fingernail.

Q. Are they similar to the ones here?

A. They are approximately the same size.

Q. Are you feeding them wet or dry?

A. Dry.

Q. Do you have any children around your house?

A. No.

Q. So that they might have gone in and taken the beans themselves and eaten them?

A. No. [210]

Q. How long did you observe the duck in this manner?

A. I have ever since I have had the duck.

Q. How long has that been?

A. About eight days.

Q. Do you still have the duck? A. I do.

* * *

(Testimony of Alvin W. Elder.)

Recross Examination

By Mr. Irwin:

Q. Of course, Mr. Elder, with your 14 years experience as a game agent, you wouldn't want the court and jury to think that what a duck would do under confinement, with no other choice, would be a fair test as to what it would choose for its eating habits if it were in its native habitat, would you?

A. No, I wouldn't want to tell them that.

Q. As to these 175 clubs you have under your jurisdiction, do I understand that you are not familiar with all the clubs in the Ventura area, as to whether they feed before the season is open or not?

A. No. I have been on their property.

Q. It is also true throughout your district, in some areas there is a great deal of natural feed and water, and in other areas, like in Ventura, there is a different situation than that found around the Salton Sea or the Imperial Valley? [211]

A. They would have to feed there, if they wanted duck shooting.

Q. But what I am getting at is that there is a great deal of crops and grain raised naturally in, let us say, in Imperial, around Imperial, so that the conditions there are not the same as up around Ventura?

A. They are almost the same. Ventura is an agricultural county.

(Testimony of Alvin W. Elder.)

Q. As a matter of fact, conditions down in Imperial are such that the birds feed off the growing crops, much to the anguish of the farmers, don't they? A. That is true.

* * *

Q. (By Mr. Irwin): By the way, what did you tell me, again, were the types of ducks in those 35 ducks?

A. Sprig or pintail, widgeon, green wing teal, spoonbill, and a redhead. [212]

* * *

Q. Mr. Elder, I overlooked one thing, and that was I served you with a subpoena asking you to produce the original of a letter sent you by Mr. McCormick, one of the defendants. Did you bring that with you? A. Mr. Johnson has it.

Mr. Irwin: I just want to identify it, your Honor, while the witness is here. May I have this identified as the defendants' exhibit next in order?

The Clerk: Defendants' Exhibit B for identification.

(The document referred to was marked Defendants' Exhibit B for identification.)

Q. (By Mr. Irwin): I show you Exhibit B for identification, Mr. Elder, which is one sheet of paper, bearing heading, "Oxnard, California, January 19, 1949," addressed to Mr. A. W. Elder, and bearing an ink signature of James McCormick, and underneath the typewritten signature of James McCormick.

(Testimony of Alvin W. Elder.)

Attached thereto is an envelope, Oxnard, California, cancellation stamp of January 20, 1949, addressed to Mr. A. W. Elder, United States Game Management Agent, return address, James McCormick, Oxnard, California, and ask you if that letter came to you in the envelope attached hereto and was received by you shortly after January 28, 1949. A. That is correct. [216]

Q. Have you had an opportunity to refresh your recollection on that letter? Did you ever do anything or acknowledge this letter in any way, Mr. Elder?

A. I stopped in Oxnard once, but I couldn't locate my man, so I was saving it for a later date.

Q. Up to October 22, however, you had not contacted Mr. McCormick in response to this letter, either in person or by acknowledging it by letter?

A. That is correct.

Q. I don't want to prolong this, but just to cover it in a quick overall question, had you been on the premises of the Santa Clara Gun Club prior to 1:00 a. m. on the 22nd, within the previous 10 days? A. No.

* * *

(The letter referred to was received in evidence and marked Defendants' Exhibit B.)

Redirect Examination

By Mr. Johnson:

Q. You have testified that this letter was received by you on approximately the date shown from

(Testimony of Alvin W. Elder.)

Mr. James McCormick, Ditch Road, Oxnard, California. If you know, is this in reply to a letter previously sent by you to Mr. McCormick?

A. It is.

Q. Approximately when was that letter written by you to Mr. McCormick at Ditch Road, Oxnard?

A. It was written about the middle of January.

Q. Where was it written?

A. It was written in my office.

Q. That is here in the Federal Building?

A. In this building.

Q. Did you keep a carbon copy of that letter?

A. I did.

Q. Did you keep that carbon copy in your file?

A. I did.

Q. Is that part of your usual procedure in writing business letters, to keep a carbon copy of them?

A. That is mandatory in our office.

Q. Who typed the letter? A. I did. [218]

Q. You don't have a secretary?

A. I do not.

Q. Did you type it on a machine yourself?

A. I did.

Q. Did you have a carbon sheet underneath the original? A. I did.

Q. And a carbon came out as a result of it?

A. That is right.

* * *

Mr. Johnson: The government offers in evidence this letter concerning which there has been testimony as Government's Exhibit No. 15. It is a let-

(Testimony of Alvin W. Elder.)

ter on the letterhead of the United States Department of Interior, Fish and Wildlife [219] Service, Los Angeles 2, California, dated January 14, 1949.

The Court: It may be admitted.

(The document referred to was received in evidence and marked Government's Exhibit No. 15.)

* * *

LESLIE F. EDGERTON

called as a witness on behalf of the government, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Johnson:

Q. Mr. Edgerton, where do you reside? [220]

A. I reside in Filmore.

Q. What is your occupation?

A. I am a State Fish and Game Warden and Deputy United States Federal Warden.

Q. In what territory do you serve, what area?

A. I have been assigned to Ventura County.

Q. Do you know the defendants in this case?

A. I know two of them.

Q. Who are they?

A. Mr. Carty and Mr. Bob Maulhardt.

Q. Do you know where the Santa Clara River Game Preserve is? A. Yes, I do.

Q. Where is it?

(Testimony of Leslie F. Edgerton.)

A. It is located near the mouth of the Santa Clara River on the McGrath property.

Q. Did you have occasion on the 21st of October, 1949, to call upon or visit the premises of that club? A. I did.

Q. What was the circumstances of your making that visit?

A. After a radio call from Mr. Bedwell to talk things over, we had met.

Q. Who is "we"?

A. Warden John Spicer, Jack Bedwell, and myself had [221] met at the Mound Water Company. Mr. Bedwell had talked about a citation he had issued that day and talked about the people in the case. He then mentioned he had received word that there was some lima beans on the property, and he thought there might be some grain and we should investigate.

Q. Did he say he had seen it or received word?

A. I understood him to say he thought there was some down there. He said he heard there was some lima beans and he thought there might be some grain.

Q. He didn't say he had seen it?

A. I didn't hear all the conversation. That is what I heard.

Q. What occurred then?

A. We got in my car and drove to the northwest corner adjacent to the club and proceeded south on the west dike through the middle dike, and we all had flashlights, and we more or less spread out

(Testimony of Leslie F. Edgerton.)

and started down the middle dike, spasmodically lighting our flashlights, and we took occasional detours for slight distances down the cross dikes. I would say I went as far east as the No. 5 dike, maybe the No. 4 dike. At no time when my flashlight was on did I fail to see grain.

Q. What kind of grain?

A. That I would not say. I have been told it is barley, but I couldn't say. [222]

Q. Did you pick some up?

A. I picked some up, yes, I did.

Q. I hand you an object marked Government's Exhibit 10 in evidence. Is that some of the material you found on the premises, which you call grain? A. Yes.

Q. Could you further describe the condition of the premises on that particular visit?

A. Being night, you couldn't see an overall picture, but at no point did I fail to see grain. It was scattered about very thoroughly, that is, very—it was widely scattered throughout the middle dike, and at two places on that middle dike, about 10 feet square, there was a much larger quantity of grain and it was much thicker. On the side dikes, it looked like the grain had been placed there in one of two manners, either it had been dumped by can or some container in piles of half a bucketful, and in other places there were strings or lines of grain which could be left by a sack with a hole in it. It could have been dragged or carried, or

(Testimony of Leslie F. Edgerton.)

it could have been broken, with a hole in it, but there was a line of grain.

Q. Did you observe anything else besides this grain which you have identified?

A. That's all that we saw that night, was grain. We saw it everywhere we looked, on all the cross dikes and the [223] middle dike. It was solid.

Q. Did you look at the blinds?

A. No, I didn't look in the blinds.

Q. Did you go around the blinds?

A. No, we didn't go around the blinds.

Q. Did you see any in the water?

A. I saw none in the water that night, no.

Q. Did you see any wildlife there?

A. I couldn't say I saw it. We heard them. They took off, quite a quantity of ducks took off. You could hear them fly away.

Q. How did you know they were ducks?

A. They quacked and whistled and beat their wings.

Q. What did you do then after you observed those conditions?

A. After we had all got together again on the west end of the middle dike, we agreed there was much too much grain there, and that somebody should be given the word. We designated Mr. Spicer to call his superior, which we had been told to do.

Q. Who was the superior up there at that time?

A. Mr. Hecker is my superior.

Q. He is no longer living?

(Testimony of Leslie F. Edgerton.)

A. He is deceased.

Q. Did you leave then? [224]

A. After we had agreed Mr. Spicer would do the phone calling, we returned to our respective cars and went home.

Q. Did you subsequently make a visit to the premises of this hunting club?

A. I did, the next morning.

Q. Tell us about that.

A. We had all met, and after that we proceeded to a clump of willows, which I measured recently as one or a little over one-tenth of a mile from the club. From that clump of willows, five of us observed hunters hunting out of the blinds on the dikes of the Santa Clara River Game Preserve, and we watched the hunters shooting, and we watched the ducks fall.

Q. Did you subsequently, after observing them, go down and enter the premises?

A. We did. After Agent Elder and Spicer had contacted Mr. Carty at the corner and had gone around to the far side of the club.

Q. Could you see them contact Mr. Carty?

A. We did.

Q. Did you look through binoculars?

A. We all had binoculars, yes.

Q. Then you went down and entered the premises yourselves? A. Yes. [225]

Q. Tell us about that.

A. First, the hunters started out on the road, and in my car the two Wardens Bedwell and my-

(Testimony of Leslie F. Edgerton.)

self intercepted them at the east end of the middle dike and the east road.

Q. Who were those hunters?

A. Mr. Carty was the only man I recognized.

Q. How many others were there?

A. There were four other hunters.

Q. What then occurred?

A. The Bedwells got out, and I drove around, because we had watched Mr. Carty and Mr. Elder talking, and Mr. Elder hadn't taken Mr. Carty's ducks, and there was a doubt in our minds whether Agent Elder wanted us to seize all the ducks or not, so I drove around the same route I had taken to the southwest part of the club to ask Agent Elder if he wanted the ducks seized. While there, his car was parked on what we call Lima Bean Road, and I asked Mr. Elder if he wanted the ducks seized, and he said yes. I then returned to the Bedwells and the defendants.

Q. "And the defendants," what do you mean by that?

A. Well, some of them had been excused. The guests had been excused.

Q. There was Mr. Carty and four other hunters?

A. Mr. Carty and four other hunters were at the east end of the middle dike. [226]

Q. And the Bedwells were——

A. The Bedwells were then marking these ducks, tying the limit of ducks together and putting the names of the respective hunters on these ducks.

Q. That was Jack Bedwell?

(Testimony of Leslie F. Edgerton.)

A. That was Jack Bedwell and Ernie Bedwell. Mr. Carty, as I drove up, was placing his ducks in the back of his car, and I told Mr. Carty we would have to have his ducks, and he said, "Take them."

Q. Did he say anything else?

A. I took the ducks from his car and gave them to the Bedwells, and Mr. Carty walked over and spoke to me.

Q. What did he say?

A. He mentioned something about a technical case, and I told him I didn't think it was a technicality.

He then said if we wanted to be technical about it, we could pick up every club in the area.

Q. What did you say?

A. I merely agreed with him. I was not making conversation.

Q. What then happened?

A. So they got in their car and drove away and the two Bedwells and myself put the ducks in the back of my car and we proceeded west on the club, more or less inspecting, until we met with the other wardens. [227]

Q. Where did you enter the club?

A. At the middle dike.

Q. What did you observe as to the premises?

A. I didn't see anything at the far edge of the club.

Q. When did you start seeing something?

A. Up toward the No. 4 dike, where the grain started.

(Testimony of Leslie F. Edgerton.)

Q. Would you describe the condition of the premises as you saw them?

A. They are much more visible in the daytime than at night.

Q. What did you see?

A. Looking up the middle dike, there wasn't a square foot of the dike that did not contain barley, and everywhere you looked, you saw barley, and every cross dike, all had barley.

Q. What cross dike did you walk on?

A. I couldn't say. It was at random.

Q. How many cross dikes?

A. I walked on two or three or possibly four dikes.

Q. But No. 5 didn't have any?

A. I didn't see any on No. 5.

Q. Go ahead. What else did you do?

A. Together, when we had covered the ponds and the dikes, we met by Agent Elder's car, and Warden Bedwell suggested taking pictures, that he had his camera. I asked [228] Agent Bedwell if he wanted the ducks in my car along with the other ducks he had.

Q. Did you ask Agent Bedwell that?

A. I asked Agent Elder that.

Q. Go ahead.

A. I then walked back to my car and drove my car around and parked it beside Agent Elder's car and took the ducks from my car and placed them on the ground where some he had seized were, and he took the rest out of his car and put them on

(Testimony of Leslie F. Edgerton.)

the ground. Then Warden Bedwell took his pictures.

Q. Showing you Government's Exhibits Nos. 2 through 9 in evidence, do those scenes photographed or portrayed in those pictures represent the condition of the premises of the Santa Clara Game Preserve as you saw them on the occasion in question and to which you have testified? Look them over. That is you pictured in No. 9, isn't it?

A. It is. Yes, these pictures depict the general outlay of the——

Q. That is particularly along the south road?

A. These pictures were all taken on the south road dike.

Q. But you have also observed, as you have testified, in the most northern part of the area?

A. In my opinion, there was much more grain on the middle dike than on the south dike. [229]

Q. Were there any lima beans on the middle dike?

A. The only place there were lima beans was on the west end of the south road dike that I saw.

Q. One of these pictures has a couple of cars in it. Referring to Government's Exhibit No. 8 in evidence, whose cars are those in the picture?

A. The dark one on the right is Agent Elder's car, and the light one on the left is my car.

Q. And that is parked in the position which, according to your testimony, you arrived at when you came there?

A. I drove over to bring the ducks over.

(Testimony of Leslie F. Edgerton.)

Q. Could you give us an estimate as to the distance between, say between these dikes here, all of them, the cross dikes? A. I could not.

Q. Could you give any estimate as to the length or breadth of the property?

A. Last Saturday I took my car and it measured almost a quarter of an inch—a quarter of a mile north and south and about a third of a mile east and west.

Q. You mean like so?

A. That was the outside dimensions of the club.

Q. Then I must have mine somewhat out of scale.

A. That is what my speedometer said.

Q. How far was this clump of willows from the northwest [230] corner?

A. Slightly over one-tenth of a mile, and that is on a road. As the crow flies, it might be a tenth of a mile.

Q. Did you take any samples of the grain?

A. I did.

Q. When was that?

A. I took it the night of the 21st.

Q. What did you do with the sample?

A. I didn't bring them in the next morning. Everybody had so many samples, we decided to forget about mine.

Q. Handing you Government's Exhibit No. 12 and 14, would you examine the material in those exhibits? Would you regard those as samples of the material which you found on the premises of

(Testimony of Leslie F. Edgerton.)

the Santa Clara Club on the morning of October 22nd? A. I would. They are similar.

Q. Did you see any ducks when you arrived on the premises on the morning of October 22nd?

A. I don't recall seeing any on the water. I saw ducks flying over and I saw ducks shot, and I saw some ducks fall.

Q. How long have you been a game warden?

A. I have been with the State Fish and Game for eight years.

Q. From your experience in that capacity, do you think [231] ducks will eat barley?

A. I know they will eat barley.

Q. How about geese?

A. Geese definitely will eat barley. [232]

* * *

Cross-Examination

By Mr. Irwin:

Q. Mr. Edgerton, I believe you testified—I am not sure—in addition to being State Fish and Game Warden, you [235] are also a Deputy Federal Game Warden. A. That is right.

Q. How long did you say you were with the service, approximately?

A. I have been with the Division of Fish and Game for eight years.

Q. By the way, so we won't needlessly go over a lot of matters, you were in the court room throughout the testimony of the other agents who preceded you on the stand? A. I have been.

(Testimony of Leslie F. Edgerton.)

Q. You know the defendant Mr. Maxwell, do you not?

A. I do not. I know him since I have been here. That is all.

Q. Do you recall having received a telephone call from a man who identified himself as E. C. Maxwell about three weeks before the season opened?

A. I do not.

Q. You do not? A. I do not.

Q. I beg your pardon. Did you yourself call Mr. Maxwell? A. I called Mr. Maxwell.

Q. You had a conversation with him?

A. I did.

Q. What was it about? [236]

A. I called Mr. Maxwell for the express purpose of finding out the acreage of the gun club and the officers of the gun club for the survey which all wardens make to send to the San Francisco office.

Q. That was how long prior to the opening of the season?

A. On or about the 8th of October.

Q. And he gave you the information you requested?

A. He gave me the information I requested.

Q. Did he not in turn ask some information from you? A. That he did.

Q. Isn't it a fact that he asked you what the regulations were for the coming shooting season?

A. He asked me if there had been any changes in the regulations.

(Testimony of Leslie F. Edgerton.)

Q. What did you tell him?

A. I told him not that I knew of.

Q. When he spoke about whether or not there had been any changes in the regulations, did he ask you whether or not there had been any change in the regulations with regard to feed?

A. That is true.

Q. And isn't it a fact that you told him that, after saying there were no changes, you were telling the other gun clubs that they could feed up to 10 days prior to the opening [237] of the season?

A. No, that is not exactly right.

Q. What did you say in that regard?

A. We informed the other clubs the same way. We went to the other clubs and talked to the caretakers and asked the information that I asked of Mr. Maxwell.

They, like Mr. Maxwell, brought up the feeding question, and it was mutually agreed that if they quit feeding within 10 days before the season, the feed should be eaten up, but we further stipulated under no circumstances were they to shoot over a baited area.

* * *

Q. (By Mr. Irwin): Your answer is what you told the other caretakers. Did you tell Mr. Maxwell substantially what you just now stated?

A. I told Mr. Maxwell what we had told the other clubs. I did not talk to Mr. Maxwell directly. I told Mr. Maxwell what we had told the other clubs.

(Testimony of Leslie F. Edgerton.)

Q. When you say you didn't talk to him directly, you dont quite mean that. You were talking to him and you told him you had given the other clubs information that it had been mutually agreed that they could feed up to 10 days before the season opened? A. No, not necessarily. [238]

Q. I want to know what you told Mr. Maxwell.

A. I believe I have already stated that.

* * *

The Court: What did you tell Mr. Maxwell.

The Witness: I will repeat. I told Mr. Maxwell we had gone and talked to the other clubs to get the information for the San Francisco office on how many acres they had on their club, who was president of the club, who was secretary, or the treasurer of the club.

There was brought up by them questions about the feeding regulations. We told them there were no changes. We talked it over and they talked about feeding, and we felt together [239] that if they quit 10 days before the season opened, that the feed should be eaten up, if there wasn't an excess amount of feed put out, the ducks should eat the feed up, but Mr. Warden Spicer and I further said under no circumstances were they to shoot over a baited area.

That is what I told Mr. Maxwell.

Q. (By Mr. Irwin): All that is what you told Mr. Maxwell?

A. I wouldn't say word for word, but that is the gist of the conversation.

(Testimony of Leslie F. Edgerton.)

Q. Did you tell them what you and Mr. Spicer agreed?

A. Mr. Spicer and I had agreed on nothing.

Q. You agreed among——

A. There is Mr. Spicer, Mr. White, and Mr. Muldoon, and myself.

Q. They were all present when you were talking to Mr. Maxwell? A. I was by myself.

Q. Did you include in your talk to Mr. Maxwell what you and Mr. Muldoon and Mr. Spicer had agreed on? A. That is right.

Q. Didn't you further state you would check and if there was anything additional, you would call back and notify Mr. Maxwell?

A. Mr. Maxwell asked me if there had been any changes, [240] and I said I did not think so.

He said, "Aren't you wrong? Isn't it true there is a 72-hour regulation?"

He said Mr. Carty had talked to the Attorney-General and got a ruling from the Attorney-General that 72 hours was sufficient time.

I told him I would check up on it and I laid the phone down and read the federal regulations again and came back and told Mr. Maxwell I saw no changes, but I would call either Agent Elder or Mr. Macklin, and if there were any changes, I would notify Mr. Maxwell.

Q. And you never called him back.

A. There were no changes.

Q. When you said you looked at the federal regulations, there is nothing in the federal regulations

(Testimony of Leslie F. Edgerton.)

about whether they shall feed up to 10 days or anything else, is there? A. No.

Q. So you wouldn't want the jury to think you looked at some regulation about what they could do about feeding? A. I did.

Q. There is nothing in the regulations about whether it is 10 days or two days, or anything, is there?

A. The regulations say that they shall not shoot over a baited area. [241]

The Witness: It stiplifies no time.

Q. (By Mr. Irwin): Between the time you called Mr. Maxwell on the telephone and on the evening of October 21 when, I think you stated, you were at the club, had you been in the vicinity of the Santa Clara Game Preserve?

A. I had not.

* * *

R. E. BEDWELL

called as a witness by and on behalf of the government, having first been duly sworn, was examined and testified as follows: [242]

Direct Examination

By Mr. Johnson:

Q. Mr. Bedwell, where do you reside?

A. 318 Mohawk Road, Santa Barbara, California.

(Testimony of R. E. Bedwell.)

Q. Will you speak up loud enough so everyone can hear you? A. I will attempt to.

Q. What is your occupation?

A. State Game Warden and Deputy United States Warden.

Q. What is your principal job of those two?

A. Enforcement of the state laws and the federal regulations.

Q. Are you paid for your position as Deputy Federal Game Warden? A. No.

Q. Is that the custom with regard to those jobs?

A. That is right.

Q. Do you know the defendants in this case?

A. I know several of them.

Q. Do you know Mr. Carty and Mr. Maxwell?

A. I do.

Q. And most of the others? A. I do.

Q. How long have you been a game warden?

A. Since the 7th day of July, 1927. [243]

Q. Always in California?

A. That is right.

Q. How long have you been up in that particular area around Oxnard?

A. Practically—in fact, all that time, excepting about 18 months.

Q. You know where the Santa Clara River Game Preserve is located, do you not? A. I do.

Q. Directing your attention to the date of the 21st of October, 1949, were you in the vicinity of that game preserve? A. I was.

(Testimony of R. E. Bedwell.)

Q. Did you actually visit the premises on the 21st of October? A. No, I did not.

Q. But you were near there? A. I was.

Q. Did you observe anything at the time you were near there? A. Well——

Q. Excuse me. First tell us about what time of the day it was on the 21st.

A. Well, this was around 10:30, 11:00 o'clock, I imagine, maybe a little later than that. I didn't pay much attention. [244] We were in the area.

Q. Who was with you? A. Jack Bedwell.

Q. He is your son, is he? A. That is right.

Q. Go ahead.

A. We were in this area, listening for early shooting, and we were parked at the northwest corner of the Santa Clara Game Preserve ponds. We were parked there as the hunters from the club went out into the blinds.

Q. What time did they go out into the blinds?

A. It was approximately—well, I didn't look at my watch, but I would say it was around 11:30.

Q. What time did the season open?

A. At noon, 12:00 noon.

Q. Did you or did you not observe any wildlife around the premises of this club?

A. Yes. I made an estimate at the time to Jack Bedwell that I estimated there was at least 15,000 birds got up off of the ponds as they started to go out to the blinds.

Q. Were they ducks? A. They were ducks.

Q. Were there any geese?

(Testimony of R. E. Bedwell.)

A. I did not observe any geese. [245]

The Court: Excuse me. Did you say 15,000?

The Witness: Approximately.

Q. (By Mr. Johnson): Did you have occasion to visit the premises of the Santa Clara River Game Preserve on the next day, the 22nd of October?

A. I did.

Q. At about what time was that?

A. That was between 7:00 and 8:00, I imagine.

Q. You did observe the condition of the premises on that private hunting club on that date and at that time?

A. Well, when I actually went onto the premises to observe, it was later than that.

Q. That is what I am referring to, when you actually entered the premises.

A. That is right.

Q. Did you observe the condition of the premises? A. I did.

Q. Could you tell us what your observations were of the premises of the Santa Clara River hunting club?

A. Well, I entered from the east road, proceeded out the middle dike, and I saw no grain or anything of that nature to speak of until I arrived at dike 4, and from there on, checking back and forth onto the center—off the center dike to the dikes 4, 3, and 2, there was an abundance of barley scattered along the dikes. [246]

Q. How heavily was it scattered?

A. Well, I could have reached down most any

(Testimony of R. E. Bedwell.)

place in the pickle weed and picked up a handful of it very easily.

Q. Was there any along the middle dike?

A. Yes, there was.

Q. How far along the middle dike?

A. Well, out to about as far over to the west as I went.

Q. How far was that?

A. Which was approximately dike 2.

Q. Go ahead.

A. And out to dike 4. In fact, I didn't see any grain or beans or anything else in the way of feed from dike 5 on out.

Q. From dike 5 on south to the road?

A. That's right.

Q. Now, what else did you observe with regard to conditions of the premises?

A. Well, there was on the south dike, approximately the intersection of dike 2, scattered along the road there——

Q. Which way?

A. Well, from that turn out to the east. There was, well, I used the word paved with lima beans because they were so thick that the sun actually shined when it hit the beans.

Q. Excuse me. Was there any barley in that particular [247] area?

A. Very little barley in the beans, excepting around—I didn't pay much attention—approximately between dikes 2 and 3, or possibly between 3 and 4, where there was an overlap between the

(Testimony of R. E. Bedwell.)

barley and the beans. There was a mixture there.

Q. Could you comepare the condition of the south dike road, which you have just discussed, with the portions of the club north of that, which you previously described? Which was heavier or lighter?

A. Well, I would say that in comparison the pickle weed and all on the dikes, the grain was actually heavier on the middle dike than it was most of the places along the south dike road.

Q. You are referring to the barley?

A. That's right, the barley.

Q. Now, Mr. Bedwell, showing you Government's Exhibit, or photograph from Government's Exhibits 2 through 9, inclusive, will you please examine those closely, take your time, and tell the court and jury if those scenes in those photographs substantially depict the conditions of the premises as you observed them on the date and under the circumstances to which you have testified? [248]

* * *

The Witness: That is right.

Q. (By Mr. Johnson): What is your answer to that? A. That is right, they are the same.

Q. Showing you Government's Exhibit No. 1 in evidence, can you tell us with relation to that photograph, which is the exhibit, where you were when you made your observation from way off, as you testified, on the previous day?

A. Well, on the previous day, we come out this

(Testimony of R. E. Bedwell.)

north road here, there is a fence line between that and the property, and we parked on over to where this ditch line here and this corner of this pepper field come together. It is off the picture.

Q. That is when you observed the 15,000 ducks, as you testified?

A. That is right. As the hunters came down from this angle here to the west to the ponds and the birds got up and came out over us toward the grass lake and the ocean.

Q. That is the northwest corner then, is it?

A. That is right. [249]

Q. On this date, October 22, when you entered the premises of the private hunting club, did you have any conversation with any hunter?

A. The only conversation that I had with any hunter was Mr. Carty as he came out off the middle dike to the east road with four other hunters, but I had no conversation direct with them.

Q. That was as you entered the premises?

A. That is right.

Q. Will you relate that conversation to the court and jury, please?

A. As Warden John Bedwell and Warden Edgerton and myself got out of the car, Mr. Carty and four other hunters came off of the middle dike and were just within a couple or three steps of the fence. Mr. Carty says, he spoke first, and he said, "Well, Ernie, it looks as though we are honored by having the entire patrol force here."

I said, "Not quite."

(Testimony of R. E. Bedwell.)

He said, "Well," he said, "It looks as though there is no better time than the present to find out the legality of this feeding in court."

I said, "That is about right."

He said, "Now, Ernie, if you want to be technical," he said, "You could pick up every club in the valley."

I said, "Ed, are you inferring that this is technical?" [250] To which he did not answer.

Q. Did you have any further conversation with him? A. Not direct, no.

Q. Or with any other defendant?

A. No, any more than after Mr. Edgerton, Warden Edgerton went around and contacted Agents Elder and Spicer, he came back and he stated that we were to confiscate the birds, and I told them all collectively that I was sorry, that their birds would have to be confiscated and that they would be given notice when to appear in United States District Court.

Q. Referring to this grain, the barley you saw on the premises, what was its state, as best you can recollect, the state of freshness?

A. Perfectly dry. It was pretty hard for me to state and, in fact, I would not state as to just when it was put out. It was perfectly dry. It was not puffed grain, or anything like that.

Q. Was it any particular kind of barley?

A. It was threshed barley, clean barley.

Q. Handing you an object marked Government's Exhibit No. 14 in evidence, would you say that is

(Testimony of R. E. Bedwell.)

a fair sample of the barley and lima beans which you observed on the premises on that day?

A. Yes. I was present when this was scooped up by [251] Agent Elder.

Q. Did you see him take other samples, too?

A. I did. That was the second sample that was taken. The first one was taken—he had an aluminum cup and he scooped up the sample in the cup.

Q. Would that be this particular cup, Government's Exhibit No. 12?

A. That's right. That was the first one I saw him take.

Q. Mr. Bedwell, you say you have been a warden for how long now?

A. Since the 7th of July, 1927.

Q. That is 23 years, isn't it?

A. That is right.

Q. In your experience as a game warden, have you learned or do you know whether ducks will eat lima beans?

A. I haven't actually seen the birds pick up lima beans, but I know that it has been put out from my own knowledge. It has been put out by various clubs as feed along with barley. I see it stacked in there, piled in the feed along with the barley.

Q. What is your experience or what is your knowledge with regard to the feeding habits of ducks, if you have any?

A. Ducks, in my experience, will pick up any feed regardless of whether it is lima beans or, I would say, any [252] other type of bean that is

(Testimony of R. E. Bedwell.)

in the immediate area at the time, if they are hungry. The same as wild pigeons will clean up tione berries and the next day come down and feed off of the buds on walnut trees.

Q. What about geese?

A. They would be in the same category.

Cross-Examination

By Mr. Irwin:

Q. Mr. Bedwell, when you were at the area first on October 21, as you have testified, how long prior to October 21 had it been that you were in the vicinity of the Santa Clara Game Preserve?

A. I would say a year previous.

Q. You hadn't been there at all?

A. I had not. That was not my assigned district.

Q. Did you not issue a statement to the Santa Barbara Free Press stating that you had had the club under observation for some time?

A. I did not. [253]

* * *

Q. (By Mr. Irwin): After October 22, did you talk to any representatives of the press?

A. After the 22nd, the News Press called me. That was not on the 22nd, though. That was the 23rd.

Q. I said after the 22nd.

A. That is right. Pardon me.

(Testimony of R. E. Bedwell.)

Mr. Irwin: I ask to have this marked for identification.

The Clerk: Defendants' Exhibit C for identification.

(The document referred to was marked Defendants' Exhibit C for identification.)

Q. (By Mr. Irwin): I show you Defendants' Exhibit C for identification. I will not read it in its entirety, because it is not proper until it has been admitted, but I shall direct your attention specifically to the first sentence of the second paragraph and ask you to read that. You are R. E. Bedwell? A. That is right.

Q. Having read that, does that refresh your recollection [254] as to whether or not you stated to any representative of the press that you had had the club under observation for sometime?

A. I have never made the statement to them that I have had the club under observation. I made the statement to them——

Q. Let's not quibble about it.

A. ——to them that the club that the club had been under observation and had been warned a year before. That is the only statement that I made to them.

Q. The club had been under observation by whom? You say you weren't there prior to the 21st. A. I didn't say by whom.

Q. Who had had it under observation?

(Testimony of R. E. Bedwell.)

A. I know and I understand it had been under observation by Agent Elder. [255]

* * *

EDMUND WHITE

called as a witness by and on behalf of the government, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Johnson:

Q. Mr. White, where do you reside?

A. I am caretaker on Casper Road, Ventura County Game Preserve.

Q. Is the Ventura County Game Preserve a private hunting club? A. Yes, sir.

Q. You are caretaker for it? A. Yes, sir.

Q. That is your occupation, is caretaker for the Ventura County Game Preserve?

A. Yes, sir. [256]

Q. How long have you been in that capacity? How long have you worked in that type of job?

A. Ten years.

Q. For 10 years. During that time, have you had opportunity to observe the feeding habits of various waterfowl, ducks, geese, etc.? A. I have.

Q. Are you familiar with the feeding habits, specifically, of ducks, then?

A. Well, I believe so.

Q. Will ducks eat lima beans? A. Yes.

Q. Have you fed them lima beans?

(Testimony of Edmund White.)

A. Yes.

Q. Do they take it? A. They do.

Q. Where did you feed lima beans to them?

A. Well, we got a road that runs down the middle of our duck club.

Q. What is your duck club again?

A. Ventura County Game Preserve.

Q. Where is that located, near what town?

A. Oxnard.

Q. Do you know where the Santa Clara River Game Preserve is? [257]

A. Yes, I have an idea where it is.

Q. Do you know how far your club is from there? A. No, not approximately.

Q. They are both near Oxnard, is that correct?

A. That is right.

Q. What about geese? Will geese eat lima beans, too? A. I guess they would.

Q. Pardon me? A. I think so.

* * *

Q. (By Mr. Johnson): Have you ever fed them lima beans? A. No, not directly.

Q. What about barley? Will ducks and geese eat barley? A. Yes.

Cross-Examination

By Mr. Irwin:

Q. I didn't quite catch your answer, Mr. White. Was your answer generally that ducks will eat lima beans? A. Yes.

(Testimony of Edmund White.)

Q. Will all ducks eat lima beans at any time?

A. All but the large——

Mr. Johnson: Well, your Honor, that is a very speculative question. Who knowns whether a duck is hungry or not? Only a duck knows that.

Mr. Irwin: Counsel is being facetious.

Mr. Johnson: I am not being facetious. I think it is an exceedingly speculative and vague question. I object on that ground, your Honor.

The Court: The objection is overruled. Read the question again.

The Witness: I don't know about the small species of ducks.

Q. (By Mr. Irwin): You don't know about what? A. The small species of ducks.

Q. What I am getting at is this. There are lima beans and lima beans, are there not? There are large lima beans or cull lima beans, different kinds of lima beans? A. That is right.

Q. There are lima beans when they are drying and there are lima beans when they are wet?

A. That's right.

Q. And lima beans when they are deteriorating and turning into fertilizer, so that when I said under what circumstances or what conditions, I will now break it down. Is [259] it your experience that ducks, exclusive of mallards, will eat dry lima bean hulls, such as we have here in Government's Exhibit 12 in that condition?

A. When a bean stays out on the levee for 24

(Testimony of Edmund White.)

hours in the fog and the dampness from the ponds, it has a tendency to swell up.

* * *

Q. (By Mr. Irwin): I am taking one, two, three, four samples from Government's Exhibit 12. Those are beans, aren't they? A. Yes.

Q. Are they swollen up?

A. No, they are dry. [260]

* * *

Q. So that I am asking you, or I did ask you before, and you gave us your elaboration about beans swelling up in 24 hours; in your experience will ducks eat these dried beans that are not swollen up? A. Yes. [261]

* * *

DELL A. REEDER

called as a witness by and on behalf of the government, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Johnson:

Q. Mr. Reeder, where do you reside?

A. I live in Ventura, about three miles east.

Q. What is your occupation?

A. Well, right now, I am rated as a superintendent.

Q. Could you speak a little louder?

(Testimony of Dell A. Reeder.)

A. My rating now is superintendent.

Q. Of what? A. Of a club.

Q. What kind of a club?

A. Well, the Old Adobe Club. That is a duck club.

Q. A private hunting club?

A. That is right.

Q. Located near Ventura?

A. That is right.

Q. How long have you been in the occupation of being caretaker there for that hunting club?

A. Oh, all told, about 26, 27 years. [262]

Q. Where has this particular work been, what county or state? A. Ventura County.

Q. All that time? A. That's right.

Q. You have a lot of lima beans up in Ventura County? A. Yes, we do.

Q. Have you, during your experience, had the opportunity to observe the feeding habits of migratory waterfowl, such as ducks and geese?

A. I have the variety we get in that locality only.

Q. That is what I am asking you. Can you tell from your experience whether ducks will eat lima beans? A. Yes, they will.

Q. Have you fed them lima beans?

A. Yes, I have.

Q. Will they eat barley?

A. Yes, they will.

Q. Have you fed them barley?

(Testimony of Dell A. Reeder.)

A. Yes, I have fed them barley.

* * *

Cross-Examination

By Mr. Irwin:

Q. Mr. Reeder, is there any difference in the condition [263] of lima beans before ducks will take them?

A. Yes, there is. The difference depends on the size of the beans or whether the hull is on it.

Q. Does it make any difference whether they are dry or moist?

A. No. If a bean is small enough, a duck will eat it at any time.

Q. When you say "a duck," there are different species of ducks, a sprig, and so on, mallards. Is there any difference in your experience between them? For example, do you want us to understand in your opinion all ducks will eat lima beans as a natural food?

A. Well, no, I wouldn't say that. When I am speaking of feeding lima beans, about the only birds I have ever noticed that really come in for feed would be the bigger class of birds, and the sprig, mostly.

Q. The sprig mostly?

A. That's right, in our neighborhood.

Q. Whereabouts in Ventura County are you? How far are you from Oxnard, your club?

A. Well, it would be about nine miles; right straight across, it would be six.

(Testimony of Dell A. Reeder.)

Q. Mr. Reeder, you know Mr. Maxwell here?

A. Yes, I do.

Q. Did you have a conversation with him this morning [264] out in the hall?

A. Yes, I did.

Q. Is it a fact that you told him at that time you had never seen any ducks but a mallard take a lima bean?

A. I told him I had never found any duck with lima beans in but a mallard.

Q. But a mallard? A. That's right. [265]

* * *

JESSE F. THOMPSON

called as a witnetss by and on behalf of the government, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Johnson:

Q. Will you state your name again?

A. Jesse F. Thompson.

Q. What is your occupation?

A. I am chief of the branch of Game Management for the U. S. Fish and Wildlife Service.

Q. Where is your office?

A. Washington, D. C., Department of Interior Building.

Q. How did you happen to be in Los Angeles?

A. A regular tour of duty from Alaska and down the Pacific Coast.

(Testimony of Jesse F. Thompson.)

Q. In other words, you just happened to be passing through?

A. Yes, and to attend the North American Wildlife Conference this coming week in San Francisco. [266]

Q. What are your duties in this position you have just described?

A. The chief duties of the branch of Game Management are enforcement of the federal game and fish laws and control of depredation of migratory birds to agricultural crops.

Q. In that capacity, you are responsible for carrying out the regulations concerning migratory waterfowl? A. Yes, I am.

Q. How long have you been in this type of work, Mr. Thompson?

A. Since 1929 with the government, and under civil service since 1935.

Q. Are you familiar with the feeding habits of migratory waterfowl, including ducks and geese?

A. Yes, I am.

Q. Could you give us a general statement on the feeding habits of ducks?

Mr. Irwin: Just a moment. May I ask one question on voir dire?

The Court: Yes.

Mr. Irwin: It is true that the ducks and waterfowl will vary in different localities in the country, isn't it?

The Witness: That is correct. [267]

* * *

(Testimony of Jesse F. Thompson.)

The Court: I think a general foundation should be laid of the knowledge of this witness as to California ducks or, let us say, Pacific Coast ducks.

Q. (By Mr. Johnson): Are you familiar with the habits of the ducks which are in the flyways along the Pacific Coast area?

A. Oh, I have been in the Sacramento Valley and in Oregon where there are concentration centers of waterfowl.

Q. Are you familiar with the Oxnard-Ventura area? A. No, I am not.

Q. Are you familiar with the type of ducks that inhabit that area? A. Yes, I am.

Q. What kind of ducks do inhabit that area?

Mr. Irwin: I object to that as hearsay and calling for a conclusion of the witness. He said he is not familiar with the area, so how can he be familiar with the waterfowl? [268]

The Court: The objection is overruled.

* * *

Q. (By Mr. Johnson): Have you been, in your position, responsible for the receiving and examing of reports from these various areas throughout the country? A. Yes, I have.

Q. Would they include the Oxnard-Ventura area? A. I don't recall any from there.

Q. Getting back to your knowledge of feeding habits, could you tell us the feeding habits of ducks that haunt the Pacific Coast flyways, the migratory birds?

A. Well, they will differ considerably, because

(Testimony of Jesse F. Thompson.)

no one is quite sure where the ducks come from, that is, all of the ducks that visit the Pacific flyways. Some come from Canada, some from the Dakotas, and some from Alaska, so it [269] would have to be a general knowledge, if it included all the ducks that visit the Pacific flyways.

Q. Do they eat specific things and specific things only, no matter where they fly? Do they always look for barley or always look for something else?

A. No, I wouldn't say that. Generally, they eat the grains common to the area they are concentrated in.

Q. Do they eat grain?

A. Well, grain and whatever type food the ducks take.

Q. Will you say a duck will take and eat the particular vegetable or grain that is prevalent in a particular area, if he is hungry?

A. Generally that is true. I wouldn't say they would eat all the types of grain in a community.

Q. What about geese, are their habits very much the same?

A. Very much the same. They differ in a few respects, not many.

Q. Could you amplify your statement a little more about the feeding habits?

A. Generally, all over the country?

Q. In the Pacific Coast flyways.

A. We have the rice area in Sacramento, at which the ducks feed to a considerable extent. We

(Testimony of Jesse F. Thompson.)

have quite a problem in keeping them out of the fields in the lower Klamath area. [270] They eat barley and grain of that nature when no rice is grown.

Q. If ducks were in a lima bean area, would they eat lima beans, if they were hungry?

A. I am not so sure whether they would eat them or not. Perhaps they would. [271]

* * *

Mr. Johnson: We expected two witnesses here at 11:00 and they would be very brief, but they have not arrived. [272]

The Court: You just offer to present them in rebuttal and at that time we will decide the situation.

Mr. Irwin: While we are here, if with that statement you are going to rest, then I would like to make a brief observation. Are you going to rest?

Mr. Johnson: Yes.

Mr. Irwin: Then, your Honor, for the Record, I am not satisfied on the interpretation since we have had the new rules. Formerly, the rule was to make a motion to dismiss at the end of the plaintiff's case in order to entitle you to make one at the close of the evidence. I am going to concede the one I am making right now the Court should deny, but in order to protect my record, I will make it at this time.

The Court: The record can show the motion has been made and denied. [274]

* * *

EDWARD C. MAXWELL

one of the defendants herein, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Irwin:

Q. Mr. Maxwell, where do you reside, sir?

A. I reside in Ventura County, California.

Q. You are an attorney, sir? A. Yes, sir.

Q. Have you held any official position, any federal position, at any time?

A. I am past U. S. Commissioner for this district.

Q. How long have you resided in Oxnard?

A. I resided in Oxnard since 1931.

Q. Have you held any other positions? I refer now, first, with reference to the County Bar of Ventura.

A. In 1936, I was president of the County Bar of Ventura County.

Q. During the war, did you hold any other position with the Federal Government? [280]

A. I served on the Draft Board, Oxnard Draft Board.

Q. We have heard a good deal about this Santa Clara Gun Club. First, you are a member of the Santa Clara Gun Club? A. Yes, I am.

Q. Of what does the Santa Clara Gun Club consist numerically?

A. It has or had this past year nine members. The first part of 1949, it had about 14 or 15, all but approximately four being relatives of the McGrath

(Testimony of Edward C. Maxwell.)

family and McCormick family and the Doud family.

Q. Approximately what acreage is involved in the Santa Clara club?

A. I am not able to say accurately. We have already referred to it as approximately 40 acres.

Q. Do you have any club house facilities, or anything like that?

A. No, we do not. We have an old cook wagon from a threshing machine that we have the numbers of our blinds in, and we come in there in the morning and make our draws to go out to the club, but that is all the improvements, besides a little house we bought for utility purposes, which we have never used this year at all.

Q. As a matter of fact, this so-called gun club is also part of a farm, a ranch, there? [281]

A. That is correct. It is situated in the middle of an acreage that is owned by a corporation.

Q. I show you Defendant's Exhibit A and ask you if that depicts the Santa Clara Gun Club, what we call the acreage that is used by the gun club?

A. Yes, it does, substantially.

Q. That is a picture of the——

A. A little bit of it is not there, but most of it is.

Q. That is a picture you caused to be taken from the air? A. That is correct.

Q. As the approach of the 1949 hunting season was climaxing, did you, on behalf of the club, take any steps to contact any game wardens to find out what were the conditions under which you could shoot this year?

(Testimony of Edward C. Maxwell.)

A. No, I did not take any steps myself. Warden Edgerton called me somewhere around three weeks before the season, it might have been the 8th as he testified, and I had a conversation with him then about the regulations.

Q. Will you tell us what that conversation was, please?

A. He called me first and wanted to know the names of the officers of the Santa Clara River Game Club, and I told him that the president was Mr. Eugene Doud, the vice president [282] was Mr. Robert Maulhardt, and I was secretary and treasurer.

He stated to me that he was checking all the clubs to find out who the proper officers were.

Then I asked him if there had been any change in the feeding regulations. He stated to me, not to his knowledge.

I said, "Well, I understood from a conversation I had with Inspector Earl Macklin around January of the same year, 1949, that the regulations had been changed so that clubs were permitted to feed up to 72 hours before shooting.

He said he hadn't heard of any such regulations, and he said, "Wait a minute and let me get it."

So I held on the phone and he came back and said, "Well, I don't find the regulations right now but, anyway, I don't think there is anything like that in the regulations."

I said, "Well, would you mind calling Earl Macklin and asking him if the regulations had been changed?"

(Testimony of Edward C. Maxwell.)

He said, "Well, I will call Warden Elder—Agent Elder."

I said, "Well, I talked to Macklin. Will you call Earl Macklin?"

He said, "Yes, I will."

I said, "Will you let me know if there has been any change in the regulations?"

He said, "Yes, I will."

I don't know whether he said after that or just previous [283] to that time, but he said, "We have told the two big clubs"—by that he meant the Point Magu and Ventura County Game Preserve clubs—"that they were to quit feeding 10 days before the season. We told them that this year and we told them that last year."

So I said, "Well, I would appreciate it if you would let me know," and that was about the substance of the conversation.

Q. By the way, who were the officers of the gun club at the time that Mr. Edgerton called you?

A. Mr. Eugene Doud was president, Mr. Robert Maulhardt was vice president, and I was secretary and treasurer.

Q. Did you hear again from Mr. Edgerton?

A. No, I did not hear again from Mr. Edgerton.

Q. You, of course, know Mr. James McCormick, who likewise is here with you as a defendant?

A. Yes.

Q. I direct your attention first to Government's Exhibit 15, which is a letter dated January 14, 1949, addressed to Mr. James McCormick, and bears a

(Testimony of Edward C. Maxwell.)

typewritten signature, A. W. Elder, U. S. Game Management Agent. I will ask you to look that letter over, and I will ask you if Mr. McCormick showed you the original of that letter.

A. Yes, I saw the original of that letter.

Q. Did you assist Mr. McCormick in preparing a reply [284] to that letter? A. I did.

Q. I show you Defendant's Exhibit B in evidence, which is a typewritten letter dated January 19, 1949, addressed to Mr. A. W. Elder, signed by James McCormick, and ask you to examine that letter and see whether or not that is the letter you assisted Mr. McCormick in composing in reply to Government's Exhibit 15, the first letter to which I directed your attention.

A. Yes, that is the reply. I dictated it.

Q. Having in mind that reply is dated January 19, 1949, did you ever hear, either by phone or letter, or any other means of communication, from Mr. Elder, between the date of this letter, January 19, 1949, and the date of October 22, when you saw Mr. Elder on the preserves of the Santa Clara Gun Club? A. No.

Mr. Irwin: All right. First, ladies and gentlemen of the jury, you recall there was identified as a copy, and admitted by me to be a copy, of an original letter sent by Mr. Elder to Mr. James McCormick on January 14, 1949, and the [285] next document I will read is the reply which Mr. Maxwell has just stated he dictated, and it went out over Mr. McCormick's signature.

(Testimony of Edward C. Maxwell.)

"United States Department of the Interior
"Fish and Wildlife Service
"1503 Federal Bldg.
"Los Angeles 12, California.
"14 Jan. 49
"Mr. James McCormick
"Ditch Road Ranch
"Oxnard, California

"Dear Mr. McCormick:

"A few days ago in a telephone conversation with Mr. Edwin L. Carty, I was given your name as the one to contact as to the facts of the recent baiting of the Santa Clara River Game Preserve. Please accept my apologies if I have your name misspelled as I neglected to have Mr. Carty spell it out for me.

"Mr. Carty advised me that you had been told that it was permissible to bait the gun club during the closed season and up to 72 hours before shooting on the club. He also advised that this information was given to you by a deputy United States Game Warden. Mr. Carty is well known to me and I consider him a very fine person and I, acting upon his information that you had been misinformed, advised him (Mr. Carty) that it would be OK to shoot the last of the season. [286]

"I have been ordered by my Regional Office to get to the bottom of this and I am at this time asking you for your version of the reason bait was so placed in the ponds and dikes of the Santa Clara River Game Preserve.

(Testimony of Edward C. Maxwell.)

"Yours and Mr. Carty's cooperation in this matter is greatly appreciated and I assure you that any help you can give me will be treated as confidential.

"Very truly yours, A. W. Elder, U. S. Game Management Agent."

* * *

Q. Mr. Maxwell, I am going to ask you to read the reply.

A. This letter is dated January 19, 1949, at Oxnard, California.

"Mr. A. Elder
"U. S. Game Management Agent
"U. S. Fish and Wildlife Service
"1503 Federal Bldg.
"Los Angeles 12, California

"Dear Mr. Elder:

"Thank you for your letter of January 14th, relative to the Santa Clara River Game Preserve.

"Due to the fact that there are a number of things I would like to discuss with you relative to the past and proposed [287] operation of the group, I would prefer to confer with you personally, rather than by mail.

"With this in mind if you intend to come through Oxnard in the near future and would let me know, I would appreciate it or if you would prefer that I come to Los Angeles and see you I would be very glad to do so at your convenience.

"Assuring you of my appreciation of your cooperation and trusting that I will hear from you in the near future, I remain,

"Very truly yours, (signed) James McCormick."

(Testimony of Edward C. Maxwell.)

Q. Thank you. Now, referring again to this first paragraph of Government's Exhibit 15, wherein the writer states that Mr. McCormick's name was given to him as the one to contact regarding the facts of the recent baiting of the Santa Clara River Game Preserve, would you please tell the jury just what the facts were that gave rise to this correspondence?

* * *

The Witness: It came out and I did not mean to say it. The only fact that is within my knowledge is that our club did not shoot for two or three shooting days of the second half of the 1948-1949 duck season.

Q. (By Mr. Irwin): Very well. I will go into the rest of this with some of the others, then. Coming back again to the conversation which you had with Mr. Edgerton, I believe you stated you did not hear from him again. A. That is correct.

Q. And you placed that about three weeks before the season opened? A. That is correct.

Q. Now, then, not hearing from him, did you have any contact with Mr. Jack White?

A. Yes, I did.

Q. Who is he, to your knowledge?

A. Jack White is the County Game Warden of Ventura County, and was in 1949.

Q. Do you know that he is also a deputy federal game warden?

A. I don't know that of my own knowledge.

Q. Did you have any contact with him before the last season opened on October 20, 1949? [289]

(Testimony of Edward C. Maxwell.)

A. Yes.

Q. How long before?

A. The Monday before the season opened on the following Friday. That was about the 17th of October, 1949.

Q. Did that conversation have anything to do with conditions as they then might exist at the Santa Clara Game Club? A. Yes, it did.

Q. Did you make any request of Mr. White with reference to advising you as to what the conditions were at the Santa Clara Game Preserve?

A. I did.

Q. As a result of that request, did you make an appointment for him with Mr. McCormick?

A. Yes, I made an appointment with Mr. White and called Mr. McCormick to meet Mr. White in my office.

Q. Did they meet in your office?

A. They did.

Q. Then did Mr. McCormick and Mr. White leave your office? A. They did.

Q. Do you know where they went?

A. I instructed them to go out to the Santa Clara River Game Preserve and check the club.

Q. When you say "instructed," you mean requested? [290] A. I requested them.

Q. Did you get a report after they had been out?

A. I did. Mr. White came back to my office and stated they had been out to the club and that Mr. McCormick had advised him that the last grain had been put on the club on the 13th of October. He

(Testimony of Edward C. Maxwell.)

told me he had a conversation with Mr. Spicer and that Mr. Spicer had advised him that there had been no change——

* * *

A. Where did I leave off with my answer?

(The record was read by the reporter.) [291]

A. ——in the regulations, that the clubs were instructed to quit feeding 10 days before the shooting season started in October, 1949.

Mr. White told me that he understood, in a former conversation with Mr. Macklin, that such was not the case, but because of the confusion, I had better see Mr. Macklin myself.

Q. Did he say anything to you about whether he himself had found feed on his trip to the game preserve?

A. Yes. He said he thought the amount of feed on the club was not unreasonable and would, in his opinion, be cleaned up by the time the shooting season started.

Q. In response to his recommendation, not having heard from Mr. Edgerton, did you then contact Mr. Macklin? A. Yes.

Q. Who is Mr. Macklin again, for the benefit of the jury? A. H is inspector Earl Macklin.

Q. Where does he have his office?

A. In the California State Building.

Q. He is the inspector in charge, is he not, for the State of California in the Southern California area?

(Testimony of Edward C. Maxwell.)

A. That is my understanding. In fact, Mr. Macklin is sitting back there in the audience.

Q. If I haven't properly identified his title, I am [292] sure he will correct me. When was it you called on him with reference to the opening of the season?

A. The season opened on Friday noon, the 21st of October. I called in Mr. Macklin's office at or about 11:00 o'clock, on the 19th of October.

Q. Did you have a conversation with Mr. Macklin? A. Yes, I did, in his office.

Q. Was anyone else present?

A. No, there was not.

Q. What was that conversation? I take it it had to do again with what the regulations were with reference to the duck season and your preserve, of which you were a member. A. That is right.

Q. Will you please give us that conversation?

A. After the usual greetings, because I have been acquainted with Mr. —or Inspector Macklin— for some years, he asked me to be seated, and I sat right across from his desk. He was talking on the telephone, and then hung up.

I asked him what were the present feeding regulations for duck feeding. My reason for asking that was that I was attempting to find out if the 72-hour statement that I understood him to make when I talked to him in January, 1949, was in truth correct.

He said, "Well, Mr. Carty and I were at a Fish Commission meeting, Fish and Game Commission-

(Testimony of Edward C. Maxwell.)

ers." I believe he [293] said it was at San Francisco, but it could have been Sacramento. He said Mr. Carty asked for an opinion of the Attorney-General, and after they recessed for lunch, the Attorney-General came in after lunch and gave the opinion that feeding of ducks on duck clubs could be done up to a reasonable time before shooting occurred on the opening day of the season.

He said that the Attorney-General also stated that by "reasonable time," that was the time sufficient to permit the ducks to clean up the feed.

I said, "Well, I understood that there was some 72-hour regulation. You referred to it, I think, in a former conversation I had with you last spring."

He said, "Well, that is a sort of a misconception. It is probably part Jack White's fault and partly my fault. Last year, before the season opened, Jack White called me, and he wanted to know what the regulation was, and I repeated to him the opinion that we had heard given us at this Fish and Game Commissioners meeting by the Attorney-General of the State of California, and he said, 'Well, what do you call reasonable?' and I told Jack White that it could be 72—or Jack White said, 'Would 72 hours be reasonable?' and I said, 'Yes, or 84. Anything that is reasonable in time so that the feed can be cleaned up.' "

Then I said to him, "I am a little bit worried about [294] John Spicer. He worries me. He is not friendly. I wish there was some way we could get him acquainted with us and get his cooperation."

(Testimony of Edward C. Maxwell.)

He said, "Well, I had John Spicer in the office this week serving warrants, and I had a talk with him about this feeding situation and I told him that when he went out to examine the marsh, a duck marsh, that if the marsh had been substantially cleaned up, to use his head and be reasonable about it."

My nickname is Hap, and he said, "Hap, I don't mean 20 or 30 sacks of grain laying around."

So I said, "Well, he worries me."

"Well," he said, "I will tell you. I also told him not to do anything without first taking it up with me, that I wanted to know what was going on out there."

I said, "That is good enough for me."

Then I thanked him and left.

Q. Coming to the opening of the season, which was October 20th or October 21st——

A. The 21st.

Q. You did not shoot the Santa Clara Game Preserve on the opening day, did you? A. No.

Q. When had you last been at the club yourself?

A. I believe it was in the summer, some time, perhaps, [295] in August, previous to the opening of the hunting season.

Q. However, on the morning of October 22, you did go to the preserve of the Santa Clara Gun Club?

A. Yes.

Q. You had your hunting license, your duck stamp, and everything, I take it?

A. I had my duck stamp, and I think I had, by

(Testimony of Edward C. Maxwell.)

error, the license from the year before, and Mr. Elder saw it was a mistake, and it was obvious, and he said it was all right.

Q. And you also had a gun?

A. I had my gun, yes.

Q. Will you please tell the jury at what time you arrived there and what you did? Go on, in your own words, and give us the events of that morning, as you remember them.

A. We met at a coffee shop in town and had breakfast. I can't remember the exact hour, but it must have been somewhere around 4:00 to 4:15.

Q. When you say "we," you mean whom?

A. The members of the club all assembled. In fact, I think all but two of the defendants were present that morning.

After breakfast, we got in our cars and left the city of Oxnard and went out on what is known as Gonzales Road to the duck club. [296]

* * *

Mr. Johnson: So stipulated. Your Honor, I have just spoken to counsel for the defense, who has agreed we may call our two witnesses out of order, to whom I referred earlier today.

E. W. HENKE

called as a witness on behalf of the government, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Johnson:

Q. Your name is Ed Henke? A. Yes, sir.

Q. Where do you reside?

A. Ventura, California.

Q. Mr. Henke, are you a hunter of migratory waterfowl? A. Yes, sir. [302]

Q. For how many years have you been hunting?

A. Oh, 30 years.

Q. Where have you been hunting them?

A. Mostly in California.

Q. Have you ever hunted up in Ventura County?

A. Yes, I have hunted in Ventura County.

Q. You have killed a lot of birds in your life?

A. Lots of ducks.

Q. Any geese? A. Yes, some geese.

Q. During the course of your experience in such hunting, have you ever had opportunity to observe the feeding habits or the results of the feeding habits of ducks?

A. I have watched them considerably.

Q. Have you ever cut open any of them to see what they have eaten?

A. I have dressed all my own game.

Q. You have observed what is in their stomachs?

A. Yes, sir.

(Testimony of E. W. Henke.)

Q. Have you ever observed whether lima beans have been eaten by ducks?

A. I have seen lots of ducks with lima beans in them.

Q. In their stomachs? A. In their necks.

Q. In their gullets? [303] A. Yes.

Q. What kind of ducks?

A. Mostly mallards and some sprigs, pintail.

Q. What about geese?

A. I have never gotten any geese with lima beans in them.

Q. But from your experience, these birds which you have mentioned, the type which you have mentioned, do eat lima beans?

A. Yes, they do, definitely.

Mr. Johnson: You may cross examine.

Cross-Examination

By Mr. Irwin:

Q. Where do you live, sir?

A. I live in Ventura, California.

Q. In the city of Ventura? A. Yes.

Q. What is your address?

A. 559 South Evergreen Drive.

Q. What is your business or occupation?

A. My business is gasoline distributor.

Q. What club do you shoot out of?

A. I don't belong to any club or shoot in any club.

Q. When you are speaking of your experience, where do you hunt around Oxnard? [304]

A. I have hunted at the mouth of the Santa

(Testimony of E. W. Henke.)

Clara River and up and down the Santa Clara River, and over at the Point Mazu Club, outside of the club, where they allow the shooters to shoot that don't belong to the club.

Q. Have you ever been a game warden yourself?

A. No, sir.

Q. Are you related to any game wardens in this case? A. No, sir, no relation. [305]

* * *

Q. Are you acquainted with any of the witnesses for the prosecution in this case? By that, I am referring to Mr. Spicer.

A. I am acquainted with Mr. Spicer, but very casually.

Q. Are you acquainted with either of the Bedwells?

A. I met the younger Mr. Bedwell for the first time today, and I have met his father a year or two back.

Q. How about Mr. Edgerton?

A. I talked to Mr. Edgerton over the phone once.

Q. That is the only way you know them?

A. That is the only contact I have had with them.

Q. You are not related to any of them?

A. No, sir.

Q. How many times did you hunt in the vicinity of the Santa Clara River this last season?

A. Oh, I would say three times.

(Testimony of E. W. Henke.)

Q. What type of ducks did you take?

A. Pintail, teal, and mallards.

Q. Did the pintail or teal that you shot this last season have any lima beans in them?

A. No. I never killed any teal with lima beans.

Q. The other ducks you mentioned was what?

A. Pintail. [307]

Q. Did they have any?

A. Not this season, but last season they did.

Q. By this season, I am referring to the season beginning October 21, 1949. A. Yes.

Q. The mallards you have had, do I understand that they will take them occasionally?

A. Mallards have, yes.

GEORGE E. GRUELL

called as a witness on behalf of the government, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Johnson:

Q. Mr. Gruell, where do you reside?

A. Ventura.

Q. What is your occupation?

A. Professional baseball player and student.

Q. Are you a hunter of migratory waterfowl?

A. Yes, I am. [308]

Q. How long have you been hunting?

A. Oh, approximately seven or eight years.

(Testimony of George E. Gruell.)

Q. Have you killed a lot of ducks and geese in that time?

A. Quite a few ducks and just a few geese.

Q. During the course of your hunting experience, have you had occasion to observe the eating habits or the results of the eating habits of ducks?

A. Yes.

Q. Have you ever cut open any ducks you have shot down?

A. Yes, I have. I clean all my own.

Q. Pardon.

A. I say I clean all my own game, so I do.

Q. From your experience, do you know whether ducks will eat lima beans?

A. Yes, I have observed lima beans in their craw.

Q. Have you found lima beans in ducks you have cut open? A. Yes, I have.

Q. What about geese?

A. No, I never have.

Q. But you have found lima beans in ducks?

A. Yes.

Q. Ducks you have shot down? A. Yes.

Q. Whereabouts do you shoot?

A. Santa Clara riverbottom.

Q. What kind of ducks were they?

A. Mallards.

Q. Any other kind? A. Yes, a few sprigs.

Mr. Johnson: You may cross-examine.

(Testimony of George E. Gruell.)

Cross-Examination

By Mr. Irwin:

Q. How many times were you hunting in the Santa Clara riverbottom last season?

A. Oh, I would say four or five times.

Q. With reference to this last season, and by last season I am referring to the season that commenced October 21, 1949, what kind of ducks did you get from the Santa Clara riverbottom during this last season?

A. I got sprig and spoonbills and a few teal.

Q. How many occasions were you hunting?

A. I said four or five, I believe.

Q. And you got your limit each time?

A. No, I did not.

Q. How many ducks would you say you took during the last season?

A. I would say two limits.

Q. That would be about 10 ducks. How many of those [310] ducks had lima beans in them?

A. None of them. [311]

* * *

EDWARD C. MAXWELL

recalled as a witness, resumed the stand and testified further as follows:

Direct Examination

(Resumed)

By Mr. Irwin:

Q. Let's just get this Exhibit A up here so we won't be talking of things that are too obtuse.

(Testimony of Edward C. Maxwell.)

A. We came from down at the gate. He drove me down over to about this area, somewhere in there. It was dark. I don't remember just exactly the time. I only had a short [313] way to walk over to this levee. From this levee we walked down to the duck blind.

Q. May the record show you have identified what is called dike No. 3, or is that No. 27?

A. On that diagram there, it is the second dike from the west line of the club.

Q. All right. Fine. Go ahead, please.

A. That diagram is the opposite. He has these decoys, and there were two sets of them. He preceded me, because I am a little slow, in walking down the levee there, and in the pitch dark it was hard for me to keep up with him, so he went ahead and left me, and I caught up with him as he was finishing up the decoys, and then we got into the blind.

It was about 5:00 o'clock when we left the cook house. We started to shoot about 5:30 or 5:35 or something like that. We have certain hours at which you start to shoot in the mornings, and that varies each morning as it gets a little lighter, you shoot a little differently. I should say a little darker, with the time.

Then we shot ducks there until we counted our five ducks apiece that we shot down, and then Mr. Robert Doud and myself decided we wanted to be on the safe side of our limits. You are only allowed to shoot five ducks per day under the law, so he went

(Testimony of Edward C. Maxwell.)

out and picked up the ducks. He waded out into the water. I can't wade out in the water. I stayed in the blind. [314] Then he called me and said yes, we had our 10 ducks. So then I got out of the blind.

Q. Was it light by now?

A. It was light by now, yes. He had walked around to pick up the ducks in these two ponds here, which are on either side of the blind I was shooting in with him. As he went, he collected them and put them on the bank and got them together. We have what we call duck straps, and there is room for five ducks on one side, or more. In the old days they held more, because you could get more then.

As he did so, he called to me and said there was somebody out there that was arresting the club, and that he had been arrested.

Then he started up here in the car to pick me up. In the meantime, James McCormick had crossed over from this blind where he was shooting——

Q. Will you pardon me just a minute? What is that?

A. That is the third levee east of the west road of the club. He just waded across the ponds and then he told me he understood from Mr. Carty that they wanted the club to quit shooting, that we were under arrest.

I left and started over here, walking, and Mr. Doud pulled up toward me, but I did not get in the car, as Agent Elder said and Warden Spicer. I walked over to within about 100 feet of Mr. Elder, and he was some place in this area. I [315] don't

(Testimony of Edward C. Maxwell.)

know really where he was. I was not of a frame of mind by that time to pay much attention to location.

I was looking at him and when I got about 100 feet from him, he yelled at me, "You are under arrest for shooting over baited ponds." He was very belligerant in saying so. I walked right up to him. He was standing towards the front of his car.

He said, "What is your name?" I told him my name was Edward C. Maxwell.

He said, "What is your occupation?" I told him I was a lawyer.

Then he said, "What is your address?" I told him my address was 326 South Eighth Street.

I said, "Now, what is your name and what is your occupation?" Because at that time I did not know who he was or what he was, and then he pulled out a card and handed me a card, and on it was his name.

I said, "Well, I don't understand. What is this setup anyway?" I said, "This club was shot on yesterday. The warden was out yesterday."

He said, "You had your warning."

I said, "Who had their warning?"

He said, "I warned Mr. Carty last year." He said, "You have had your warning."

I said, "Well, Mr. Carty isn't an officer of this club. [316] Why didn't yau take this up with the club. [316] Why didn't you take this up with the and asked you to either come up and see us or let us come down to see you to talk this over with you."

(Testimony of Edward C. Maxwell.)

He said, "You didn't answer what I said in the letter."

I said, "I know, but it was not through lack of cooperation."

He said, "Well, you had your warning." He kept repeating it and repeating it, and I was getting angrier all the time.

I said, "Why do you think it is a warning to our club when Carty isn't even an officer?"

He said, "He is president."

I said, "No, he is not."

He said, "He was president last year."

I said, "No, he was not president last year or this year. Eugene Doud is president and Robert Maulhardt is vice president and I am secretary and treasurer. Why didn't you get in touch with us?"

He said, "You have had your warning," and that was the end of that.

Then he started quoting from the Migratory Bird Act and handed me a pamphlet, and I said, "I have got several of those."

He said, "There wasn't anything else I could do." He [[317] said, "You can find a handful of grain on the marsh, pick up handsful," he said, "of the grain on the marsh."

I said, "With the amount of ducks that are here, how long would a few handsful of grain last with all the ducks that are here?"

He said, "I could go around and scoop up three or four boxes full."

He did not say he could go over to the club and

(Testimony of Edward C. Maxwell.)

in lots of places pick up three or four buckets full.

I said to him, "Mr. Elder, how long would it take all the ducks in this duck club today to eat up three or four buckets of grain that you could pick up on this marsh?" He did not answer me.

Then I said, "You know, I am beginning to get an inkling of this case." I said, "This case has a rotten smell to me."

There were four State game wardens and a federal agent to arrest 14 fellows shooting out there on a marsh, and there wasn't any of those men that hadn't lived in Ventura County almost as long as these wardens, or longer than these wardens have been wardens, and many of these wardens know most of the men and myself by our nicknames.

So I said, "This smells rotten," and I was getting very angry, and I said to Agent Elder, "You know, I have always been sympathetic towards an officer enforcing the law in the line of duty, but I hate your guts for the way you are handling [318] this case."

That just about wound up our end of the deal. He asked for my badge and for the stamp, and then he told me—one more thing was said. I said, "Are you going to confiscate the ducks?"

He said, "Well, you know what we are going to do with the ducks. You know the federal law as well as I do." His words struck my sense of humor a little bit and I said, "I am frank to tell you that I have a hard time keeping up with the California law in this state, and I don't know the federal law."

(Testimony of Edward C. Maxwell.)

So I did not know the answer to the question until he called me. Then I left.

All the time this conversation took place, Mr. James Robert Doud stood right there by my side, and some of the time, if not all, Mr. John Spicer was there. He made the remark that there was nothing said by him to me, but Mr. John Spicer walked up to me after Mr. Elder had accosted me and said, "Well, well, imagine seeing Hap Maxwell here," and shook hands.

Q. Now, Mr. Maxwell, pursuant to my request, did you make certain experiments with spreading grain on the water of the ponds of the Santa Clara Game Club and then thereafter take pictures?

A. I did. [319]

Q. When was that experiment made?

A. That experiment was made last Saturday afternoon at approximately 2:00 o'clock.

Q. Who was with you when the experiment was made?

A. A photographer by the name of Phil Livingstone and Mr. Vincent Doud, one of the defendants.

Q. The photographer is a professional photographer? A. That is correct.

Q. Where was the experiment made?

A. It was made on the corner of one of the ponds of the duck marsh that still had water in it. It was made on this marsh right there, the most westerly pond, northerly pond west of the west line and north of the center, so-called center road.

Q. By the way, before I forget it, on this morn-

(Testimony of Edward C. Maxwell.)

ing of October 22, going back a second, where were the ducks congregated, if any place, what part of the marsh?

A. Why, you mean when we first went on?

Q. That's right.

A. I have no idea. It was pitch dark.

Q. Did you notice any ducks seated on the dike or the levee there that morning?

A. No. It was pitch dark when we went out there, and when they start to shoot, they raise up in flight.

Mr. Irwin: Will you mark this for identification, please? [320]

Well, will you mark all of these as they are in sequence, please?

The Clerk: Defendant's Exhibits D, E, F, and G for identification.

Q. (By Mr. Irwin): This experiment you conducted, was that conducted with grain?

A. It was conducted with the identical type of grain placed on the marsh by the club. It was the same grain taken out of about 45 pounds that remained unused after the duck season was over.

Q. As secretary and treasurer of the club, do you know how much grain was purchased prior to the opening of the season for use on the game preserve?

A. There was 80 sacks, according to the invoice. I did not see the sacks.

Q. You had nothing to do with when it was spread or the division of it, so I will have to get

(Testimony of Edward C. Maxwell.)

that from Mr. McCormick, but it was left over, was it, about 45 pounds in one sack, with which you made the experiment to which I am about to direct your attention? A. That is right.

Q. Now, I show you Defendant's Exhibit D for identification and ask you what that is, and if you know whose hand that is appearing over that bucket.

A. Yes. That is a portion of a bucketful of the [321] grain that we took out of the sack I just referred to, and that is my left hand in which the grain reposes, and my right hand is balancing the bucket.

Q. Now, then, I show you Defendant's Exhibit E for identification and ask you to tell me what that represents.

A. Yes. I stood almost where this picture is centered, not quite, but almost, and took from the bucket that you see in this picture, or Exhibit E, the same one you referred to, Exhibit E, I took 18 handsful of grain and threw them in the corner there at the edge of the water, and that is the grain that you see in the bottom of the water, and the top is just the waste, there was wild celery seed, and the top is not all grain, and along the edge of the water isn't grain, either.

Q. You were right there and watched the effects of your first scattering these 18 handsful of grain, and then you directed this picture be taken as the result? A. Yes.

(Testimony of Edward C. Maxwell.)

Q. That picture was taken about how long after you scattered the grain?

A. I would say not over a minute or two.

Q. Who is this gentleman that appears with the bucket in his hand?

A. That is Mr. Vincent Doud, one of the defendants.

Q. Now, then, I show you Defendant's Exhibit F for [322] identification and ask you was that taken at approximately the same time and place?

A. Yes.

Q. Do you know what that represents?

A. Yes. That represents a picture of the grain thrown on the water, two handsful, by Mr. Vincent Doud. That was taken, however, at a different place than the grain that I threw in the water there in Exhibit E. It was taken across on the first levee east of the west road, about 25 or 30 feet north of the middle road.

Q. I show you Defendant's Exhibit G for identification and ask you if you will tell us what that shows.

A. That is a picture of four handsful of grain taken approximately a minute after it hit the water. That was put in there by Mr. Vincent Doud, one of the defendants. [323]

* * *

(The photographs referred to were received in evidence and marked Defendant's Exhibits D, E, F, & G.)

Q. Exhibit E was how many handsful?

(Testimony of Edward C. Maxwell.)

A. 18 handsful placed there by me.

Q. And Exhibit F?

A. Exhibit F was two handsful placed by Mr. Vincent Doud, and Exhibit G was the four handsful. [334]

* * *

Cross-Examination

By Mr. Johnson:

Q. You testified that the acreage of the Santa Clara Game Preserve, the Santa Clara River Game Preserve, is a total of 40 acres. You don't mean to say that the area depicted in that diagram amounts to 40 acres, do you?

A. I don't believe it does, no.

Q. Approximately how many acres are contained in the area in which the ponds are located?

A. I don't know, but I would imagine, or my best judgment would be somewhere around 20, something like that, more or less.

Q. Referring to your conversation with Mr. Earl Macklin which, according to your testimony on direct examination, took place on the 20th of October, would you state that Mr. Macklin told you that all grain must be cleared up before you start shooting, no matter when it is put out?

The Witness: Could I have that question read to me, please?

(Question read by reporter.)

A. He stated that the Attorney-General had given an opinion that the grain should be cleaned up. [342]

(Testimony of Edward C. Maxwell.)

Q. He did tell you that, did he not, that no matter when you put it out, whether it was 72 hours, 84 hours, or even 10 hours, it had to be cleaned up before the hunting season opened and you started shooting?

A. I don't recall that he made that statement. He made the statement to me that he had talked to John Spicer and told him to use his good judgment, and if the grain was sufficiently cleaned up, to use his good judgment in that respect.

Q. Is it your testimony then that Mr. Macklin did not himself personally tell you directly that all grain and all other feed put out on the premises of your club must be cleaned up before you started shooting; is that your testimony?

A. I don't remember him saying that.

Q. I think you testified, too, that Mr. Macklin told you that he notified Spicer to contact him, that is, Mr. Macklin, should he find any grain or feed upon the premises of the club? Is that what you testified to? A. No, he didn't say that.

Q. What did he say?

A. He said, "I told John Spicer not to do anything in any event without first taking it up with me."

Q. Well, that was referring, of course, to this business of feeding and a possible violation? [343]

A. Yes, I imagine so.

Q. Isn't it a fact, Mr. Maxwell, that Mr. Macklin did not say quite that, that he said that he would tell Spicer or had told Spicer to contact either him,

(Testimony of Edward C. Maxwell.)

Macklin, or his immediate supervisor, which was Captain Hecker?

A. I have no recollection that he said that, no.

Q. You are not sure?

A. The reason I don't believe he said that was because he said, "Without first taking it up with me so I would know what was going on up there."

Q. He said what?

A. He said, "I told Johnnie Spicer in any event not to do anything without first taking it up with me so I would know what was going on up there."

Q. Do you deny that he said to take it up with him or with Spicer's immediate supervising officer?

A. I have no recollection that he made that statement.

Q. But you do recollect these other things to which you have testified that took place during the conversation?

A. That is correct. I also had another conversation.

Q. Excuse me, if you will, please, but let's stick to this one conversation for a while. You stated that you told Mr. Macklin that you thought Spicer was not very friendly to [344] you, and so forth. As a matter of fact, didn't you tell Mr. Macklin at that time that Mr. Spicer had never accepted invitations to hunt on your club?

A. I might have. That is possible.

Q. And didn't Mr. Macklin reply that as a matter of policy he directly discourages all wardens under him from accepting such invitations?

(Testimony of Edward C. Maxwell.)

A. He might have said that.

Q. Did he say that?

A. I don't remember, but he might have. I wouldn't deny it.

Q. You had a telephone conversation with Mr. Macklin on the 10th of October, didn't you, on or about the 10th? A. The 10th of October?

Q. Yes, a telephone conversation.

A. With reference to feeding?

Q. Yes.

A. I don't recall that. I might have, but I don't recall that.

Q. Let's see if this will help you. Didn't you have a telephone conversation on or about the 10th of October with Mr. Macklin, at which time Mr. Macklin told you you could feed on your club if it was cleaned up before shooting?

A. I don't recall that.

Q. But you do recall the occasion on which you had a [345] conversation with him on the 20th of October?

A. Yes, I do. I went to his office.

Q. Isn't it true you had a telephone conversation with Mr. Macklin on the following Monday after you were cited for the violation in issue in this case? A. I did.

Q. Didn't you admit to Mr. Macklin at that time there had been some feed on the premises on the day on which you were cited for the violation?

A. I might have said there was some beans.

(Testimony of Edward C. Maxwell.)

Q. What about barley? Did you say anything about barley?

A. I have no recollection of saying there was any barley on there.

Q. But you do recall saying there were beans?

A. Yes, probably I did.

Q. Mr. Maxwell, referring to Defendant's Exhibit B, you state you dictated that letter?

A. Yes, sir.

Q. And Mr. McCormick signed it?

A. Yes, sir.

Q. Were you familiar with what was said in that letter, that is particularly with regard to the letter of January 14th, which Mr. Elder wrote to you? A. Yes. To me? [346]

Q. Excuse me. To Mr. McCormick.

A. I had that letter before me when I dictated this one.

Q. What was the reason for your dictating it instead of Mr. McCormick, or writing the letter?

A. Mr. McCormick came in to see me about writing the letter, because we had had some difficulty with the—we had been unable to shoot the club for three shoots prior to that letter.

Q. What was the reason for being unable to?

A. Of my own knowledge, I don't know.

Q. Were you an officer of the club?

A. I was and I am.

Q. So you did have some knowledge of the reason for your not being able to shoot?

(Testimony of Edward C. Maxwell.)

A. No first-hand knowledge. I was told.

* * *

Q. (By Mr. Johnson): Leaving that subject for a minute, Mr. Maxwell, and referring to the date of the 17th of October, when you stated you had a conversation with County Game Warden White, [347] I think you stated—correct me, if I am wrong—that he told you that there was an amount of feed on the premises of your hunting club, but that it was not, in his opinion, an unreasonable amount. Is that what he said?

A. Yes. But I would like to correct the statement. I was thinking of that date during the lunch hour, and it was on Tuesday, the 18th, that I had that conversation, instead of Monday, the 17th, but he did tell me after—he came in and said he had checked the club with Jim McCormick, and that while there was feed on there, it was his opinion that, considering the ducks there and the amount of feed that remained, it should be sufficiently clean up.

Q. What kind of feed was there?

A. He didn't say

Q. Did you know?

A. No. I never saw the marsh.

Q. You didn't know when it was placed there, either?

A. No, I did not. I knew—no, I did not.

Q. Because you are a lawyer, you mean you are making the proper answer in saying you don't know of your own knowledge, is that it?

(Testimony of Edward C. Maxwell.)

A. I was told, but I do not know of my own knowledge. In the face of the court's admonition, I am trying very hard to abide by his admonition.

Q. Do you keep a register of people who shoot at the [348] Santa Clara Club, a register of the people shooting on a particular day?

A. I don't myself personally.

Q. One is kept?

A. I am not sure. I think there is one, but I am not sure it is kept regularly.

Q. You are an officer of the club?

A. Yes, but I have nothing to do with that record.

Q. To the best of your knowledge, a register is kept of those who shoot on the club?

A. I don't know. There may be a record kept of the men who bring guests, because there is a guest fee, but I am not sure.

Q. As a matter of fact, you know there was one kept in the season of 1948, don't you, 1948 and '49?

A. No, I don't know. I know they keep some record for guests, but I have never inspected the guest book. Mr. Eugene Doud, president, simply went over the books, came into my office and said, "These men owe so much for guests," and I had my secretary mail out the bill.

Q. As a matter of fact, Mr. White, a County Game Warden, has shot on your club, hasn't he?

A. Oh, yes.

Q. Quite often?

A. Well, he has shot several times a season. I

(Testimony of Edward C. Maxwell.)

would [349] not know how many. He shot as my guest on occasions.

Q. But Mr. Spicer never shot on your club that you know of?

A. No, not to my knowledge.

Q. But you have asked him to hunt on your club?

A. I may have, although I don't remember whether I did or did not.

Q. Do you remember telling Mr. Macklin that you had asked Mr. Spicer to hunt on your club and he had refused the invitations?

A. I don't remember saying that I had.

Q. That he had been invited?

A. I might have.

Q. Did either of the wardens Bedwell ever hunt on that club?

A. Not on the days I was there. You know, I can't hunt every day.

Q. Since you learned from Mr. Macklin that the policy of his office is to instruct wardens not to accept such invitations, you haven't issued any, have you? A. Me personally?

Q. Yes. A. I think I have, perhaps.

Q. But you do realize it is not the policy of the game wardens to accept such invitations ever since you talked [350] to Mr. Macklin?

A. No. The only game warden I have even invited to shoot on the club that I have any recollection of was County Game Warden Jack White.

Q. But you do recall what I asked you before,

(Testimony of Edward C. Maxwell.)

that Mr. Macklin had told you it was not the policy, or it was the policy of his office to discourage game wardens from accepting such invitations? Do you remember I asked you that question?

A. I remember you asked me, and I don't think I said I remember, but I said he might have said so. It might have occurred, too.

Q. You referred to these rest ponds, Mr. Maxwell. Could you tell the court and jury again where they are located? I don't know if you did tell them. Would you tell them where they are located?

A. Do you wish me to point that out on the map?

Q. Could you refer to my humble little diagram here? A. That is not very accurate.

Mr. Irwin: Let's use the exhibit.

Q. (By Mr. Johnson): It shows the location of the ponds, and presumably there were certain ponds that were used, right, for rest ponds?

A. No.

Q. What are rest ponds? [351]

A. We call rest ponds the area over which there is no shooting.

Q. Are they these squares that are depicted in this picture, Government's Exhibit No. 1? Would it be in one of those?

A. Over here, if there were no water over here or very little water, into this area, they would be rest ponds, over in here.

(Testimony of Edward C. Maxwell.)

Q. In other words, this might be a rest pond, this particular one here?

A. It could be, yes.

Q. Or this one? A. Yes.

Q. What were being used as rest ponds on the 22nd of October? A. I don't know.

Q. You don't remember?

A. I didn't see any. It was dark when I came on the club, and I came off directly, as I told you, I came off of there and came right on down.

Q. When you have a rest pond, though, you don't hunt over it, isn't that the idea?

A. As a rule, we don't hunt over the rest pond, no, although if the hunting is slow, sometimes the men go out and walk through the area, or if there is a crippled duck there, [352] the men pick it up.

Q. But generally, you don't?

A. That is correct.

Q. Don't you generally agree which particular pond or area is to be a rest area?

A. We do not.

Q. How do you know which are the rest ponds?

A. Because they are areas which don't have much water in. You can't shoot ducks much over areas where you do not have water.

Q. Isn't it true that these last two ponds here, these easternmost ponds or squares were rest ponds on the 22nd day of October?

A. As I stated to you a few minutes ago, I don't know, because I did not see them. I was not over that far. I was in the east end of the club. I came

(Testimony of Edward C. Maxwell.)

out in the dark and came right straight back to where Mr. Elder was sitting, and I paid no attention to those ponds.

Q. You didn't have any understanding about where the rest ponds were? A. No.

Q. You stated that you had seen an invoice for 80 sacks of grain and that the grain which had been used in the experiment, photographs of which counsel has submitted in evidence—excuse me—you stated you saw an invoice representing [353] those 80 sacks, correct?

A. I saw an invoice for 80 sacks.

Q. Did you see any of the sacks?

A. I didn't see any of the sacks excepting the sack that was taken out on the club last Saturday afternoon.

Q. Those were the same sacks that contained the grain that had been put on the club prior to October 22nd, the same shipment?

A. Mr. Vincent Doud—yes.

Q. How many pounds did each of those sacks contain? A. I don't know.

Q. Have you ever known?

A. Only what I was told.

Q. What were you told?

A. They averaged 90 pounds.

Q. Each sack? A. Each sack.

Q. Mr. Maxwell, are you admitted to practice before the Federal Bar?

A. Yes, or I was at one time. I don't know whether it has to be renewed.

(Testimony of Edward C. Maxwell.)

Q. I think it is still good. You are familiar with the interpretation of laws and regulations, are you, as an attorney?

A. What laws and regulations? [354]

* * *

Q. (By Mr. Johnson): You are familiar with the regulation concerning the baiting of migratory waterfowl? A. Yes, I read the regulation.

Q. Did you ever attempt to interpret it in the light of your legal knowledge? A. No.

Q. Did you ever make any research into the question of just what one can do with regard to baiting and feeding?

A. No, except through the sources that I have just testified to today.

Q. I mean other than that, I mean directly as an attorney did you ever attempt it? A. No.

Q. You never attempted to advise your club or its members of what are the rights under that baiting regulation?

A. No. We knew, as I had been told by——

Q. You are familiar with the——

* * *

The Witness: I knew, as I had been told by County Game Warden White, State Game Warden Edgerton, and Inspector Earl Macklin.

Q. (By Mr. Johnson): You realize, of course, that this is a federal regulation? A. I do.

Q. And you realize, also, as an attorney, that the Attorney-General of the State of California

(Testimony of Edward C. Maxwell.)

is not the one to give the interpretation of the regulation? [356]

A. No, I did not know that I realized that.

Q. Do you now realize it? A. No.

Q. Wouldn't you agree a decision of the Circuit Court of Appeals in San Francisco, which is a Federal court, as to what is the law or the interpretation to be placed on this baiting regulation, is the law? A. I think that is correct.

* * *

Q. Now, referring again to your conversation with Mr. Macklin, [357] did you tell him how many sacks of barley had been placed out on the premises of the Santa Clara Hunting Club?

A. I don't recall that I did.

Q. You don't remember telling him that you put out forty 90-pound sacks?

A. No. May I explain my answer?

The Court: Yes, I think you can explain it.

The Witness: Inspector Macklin that day was very busy. He was on the telephone in the half hour I was in his office, I imagine at least two-thirds of the time, and it was in between calls that we were able to converse, and we were constantly being interrupted by important conversations which he had to make, but I do not recall mentioning anything about how many sacks of barley were put out on the premises.

Q. (By Mr. Johnson): Thank you. Now, Mr. Maxwell, what kind of photograph was used to take these pictures, if you recall or if you know?

(Testimony of Edward C. Maxwell.)

A. I don't know.

Q. Did you see the photograph, or I mean the camera? A. I saw the camera.

Q. What did it look like?

A. There is a square and you have to look down into it, and it looked like he had plates he had to move, and he had me look down into it myself so that the angle of the camera would truly reflect the depth of the water. I wanted it [358] in certain positions, which I felt were comparable, and I testified before that he took the picture of myself where I had put the grain, the 18 handsful of grain. I checked that with my own eyesight.

Q. Did you walk down in the water at all?

A. No.

Q. Did anyone else? A. No.

Q. You didn't muddy up the water with your hands, or anything?

A. Nobody had their hands in the water.

Q. You just threw the grain in the water and then photographed it?

A. That is correct. The grain sunk to the bottom and all this chaff and stuff stayed on the top. I backed off of there, of the road, and Mr. Vincent Doud leaned over like he is there.

Q. How long after you threw this grain into the water or on the water, or both, were the photographs taken?

A. You mean the photograph of the 18 handsful that I threw on the water, Exhibit E?

Q. Yes.

(Testimony of Edward C. Maxwell.)

A. I would say a minute or two at the most.

Q. With regard to these, how soon after the grain was thrown out there were G and F taken?

A. About the same interval of time.

Q. Referring to defendant's Exhibit D, what are those in there in the barrel, if you know?

A. In that bucket?

Q. Yes.

A. That is the same grain and all the different weeds, such as wild celery and all that, that we got out of the sack containing the 45 pounds and put in here. We simply lifted up the sack and poured about a quarter or a third of the bucket full, and then I just picked that up, because I was going to put that in, and I wanted my hands to show.

Q. That, you say, contains about 45 pounds?

A. About 45 pounds.

Q. Did you weigh it?

A. No. I am just approximating it.

Q. It was a 90-pound sack and it was about half full then? A. Just about half full.

Q. As a matter of fact, Mr. Maxwell, on October 22nd or October 21st, and for the 10 or 12 days previous to that, at least, you realized that it was unlawful that bait be on the pond at the time you are shooting during the hunting season, did you not. A. Will read that question?

Q. Let me put it this way. You knew then, on October 22nd [360] and on October 21st, that it was unlawful to shoot over baited ponds, did you not?

(Testimony of Edward C. Maxwell.)

You knew that the grain had to be cleared up before the hunting season opened and shooting started? A. Substantially, yes.

Q. What do you mean by "substantially"?

A. I understood and I still think that if the grain is substantially cleaned up on the club, that that sufficiently complies with the Act.

Q. I will show you Government's Exhibits 2, 3, 5, 6, 7, 8, and 9, and ask you if, in your opinion, the scenes depicted in those photographs reflect that the bait, if it is bait on the premises, is substantially cleaned up.

A. No, I wouldn't say that the pictures depicting the beans here, I wouldn't say that that was substantially cleaned up.

Q. More particularly referring to Government's Exhibit No. 2, which I believe shows barley, at least it looks like barley, will you say that is substantially cleaned up?

A. No. For that particular spot, I would say that there is——

Q. Go ahead.

A. Oh, maybe I don't know. It is awfully hard to judge barley.

Q. Would you say it is substantially cleaned up in [361] that particular spot?

A. No, that particular spot has a little grain, more than I would consider substantially, but not very much. It is pretty hard to judge barley.

Q. Referring to Government's Exhibit 4 which, according to the testimony of some other witnesses,

(Testimony of Edward C. Maxwell.)

represents a scene where barley was placed on the premises, would you say it has been substantially cleaned up at that particular spot?

A. If those spots were——

Q. I am talking about that particular spot. Would you say it is substantially cleaned up in that particular spot? A. Yes, I would.

Q. Would you say that the lima beans had been substantially cleaned up in all the other photographs, according to the scenes depicted?

A. I think I said I would not consider that substantially cleaned up, if that were grain.

Redirect Examination

By Mr. Irwin:

Q. Just a moment. Do I understand, Mr. Maxwell, you are conceding with Mr. Johnson, that beans are bait? A. I do not. [362]

(Witness excused.) [363]

ROSWELL C. WELCH

called as a witness on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Irwin:

Q. Mr. Welch, what is your occupation?

A. I am a game warden employed by the Division of Fish and Game of the State of California.

(Testimony of Roswell C. Welch.)

Q. Were you so engaged in October of last year?

A. I was.

Q. How long have you been engaged in conservation work? A. For nearly 21 years.

Q. Where were you working on the 21st day of October, 1950?

A. In the duck areas of southern Tulare County and northern Kern County.

Q. With whom were you working?

A. I was working with the warden of Kern County, Lester Arnold, and Mr. Long, Warden Ellis, Warden Riley, Warden O'Reilly, Warden O'Brien, and Agent Elder.

Q. Were you with Agent Elder at any time during that [364] day when you were away from the rest of the agents? A. I was.

Q. While you were with Mr. Elder, was any comment, any remark made by him about any situation at Oxnard? A. There was.

Q. This was what time of the day on the 21st?

A. Approximately at noon on the 21st of October.

Q. What did Agent Elder say to you, what did he say?

A. He said that he had a report that there had been some feeding of ducks on the club of which Mr. Carty was a member.

Q. Now, Mr. Welch, in the 21 years that you have been a game warden, you have had experience with different types of feed that ducks will eat, that are attractive to ducks, have you not?

(Testimony of Roswell C. Welch.)

A. I have.

Q. Has your work taken you in areas where lima beans are found?

A. Not in the time I have been working, but prior to that time, around the Monterey-Salinas Valley area.

Q. Have you any opinion as to whether or not beans are duck food?

A. To my knowledge, they are not eaten by ducks.

Q. In this conversation you had with Mr. Elder, did he express any opinion to you as to what he thought about [365] beans with reference to whether or not they are duck feed?

A. He said he didn't believe beans constituted a bad factor in baiting of ducks.

Q. He said what?

A. He said he didn't figure lima beans constituted a bad factor in the baiting of ducks.

Cross-Examination

By Mr. Johnson:

Q. He said "a bad factor." Did he say what he meant by "bad factor"?

A. I won't say he used those words.

Q. He didn't say ducks won't eat lima beans, did he?

A. No, he did not say ducks won't eat lima beans.

Q. You say to the best of your knowledge ducks won't eat lima beans?

(Testimony of Roswell C. Welch.)

A. I have never heard of ducks eating lima beans.

Q. What is your knowledge?

A. On the Elkhorn Slough years ago, I used to shoot there, and some of the farmers—at that time it was legal to put out feed to attract ducks, and they might have some lima beans and we put them in a pond, and they were not touched by anything. They laid there and rot.

Q. Did you see them putting them on the ponds?

A. We put them there ourselves. [366]

Q. Did they sink to the bottom?

A. No, they didn't.

Q. You mean to say a duck will never eat lima beans? A. To my knowledge, they won't.

Q. Isn't it true if a duck is hungry enough, he would eat lima beans?

A. I don't know. I never saw them that hungry.

Q. You don't know for sure that they don't eat lima beans?

A. No, but to my knowledge, they don't.

Q. Referring to this conversation of October 21 that you say took place about 12:00 noon between yourself and Agent Elder, are you sure that conversation didn't relate to an incident in the 1948-49 season?

A. I wouldn't state positively that it didn't.

Q. In other words, it might have related to the season of 1948-49, rather than to this last season, is that true?

A. There is a possibility that it might have.

(Testimony of Roswell C. Welch.)

Q. You are not sure that it related to this last season? A. No, I am not.

Q. You stated, I believe, you have spent 21 years in the service? A. Yes.

Q. And that prior to that time you had been in a lima area? [367] A. Yes.

Q. But during that 21 years, you haven't been in the lima bean area? A. No, I haven't.

Redirect Examination

By Mr. Irwin:

Q. In reference to cross-examination of government counsel, was anything said by Mr. Elder that he was expecting a telephone call?

A. I can't recall that there was.

Recross-Examination

By Mr. Johnson:

Q. How many times have you discussed this case with Mr. Carty? A. Only that one time.

Q. What one time?

A. Will you ask that question again?

Q. Yes. How many times have you discussed this case and your testimony with Mr. Carty?

A. I think it was the 31st of October I first discussed [368] it with him.

Q. How long have you known Mr. Carty?

A. I have known Mr. Carty six or eight years. I can't recall——

(Testimony of Roswell C. Welch.)

Q. Has he been on the Fish and Game Commission all that time that you know of?

A. Not all that time.

Redirect Examination

By Mr. Irwin:

Q. You also discussed your testimony with Mr. Elder, did you? He talked with you before you got on the stand, too, didn't he? A. Yes.

* * *

CARLOS GETMAN

called as a witness on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Irwin:

Q. What is your occupation, Mr. Getman?

A. I am a State Fish and Game Warden.

Q. On the 14th of October, where were you temporarily stationed in 1949?

A. I was in Ventura County.

Q. You know Mr. James McCormick, do you not?

A. I am acquainted with Mr. McCormick.

Q. Did you have occasion to see him on the 14th day of October? A. I did.

Q. By the way, the reason I am asking you these exact dates, is it part of the regulations of

(Testimony of Carlos Getman.)

you game wardens that you keep a diary and record of your activities, the people you see and the things you do, in connection with your duties?

A. It is.

Q. You have refreshed your recollection from your diary as to the date you talked to Mr. McCormick? [370] A. That is right.

Q. You say you saw him on the 14th day of October? A. That is correct.

Q. Where did you see him?

A. In Ojai, California.

Q. That would be about seven days before the opening of the duck season?

A. That is correct.

Q. This is 1949, this last October?

A. That is correct.

Q. Did Mr. McCormick make any request of you in connection with the Santa Clara Game Preserve? A. He did.

Q. What was that request?

A. I might correct that in regard to that request.

Q. Just change it to what ever happened, please, sir.

A. Mr. Jim McCormick contacted me on that particular day in Ojai and told me that there was considerable grain on the duck club, his duck club, and he said that there was a very poor flight of birds, and he did not think the birds would clean it up, and he had talked it over with Mr. Carty, and I told him I would pass the information along.

(Testimony of Carlos Getman.)

Q. Did he make a request that you please check it over?

A. I don't recall him making a remark about checking. [371]

Q. Did you say that you would?

A. No, I did not. I said I would have—would pass the word along.

Q. Did you pass the word along?

A. I did.

Q. To whom did you pass it along?

A. To Warden John Spicer.

Q. When did you do that?

A. The following day.

Q. That would be the 15th of October?

A. Yes, sir.

Q. You made a record of it, of having done that, did you? A. I did.

Cross-Examination

By Mr. Johnson:

Q. What did you tell Mr. Spicer?

A. I told Mr. Spicer exactly what Mr. McCormick had told me.

Q. Did you go to see the premises yourself?

A. I did not. I was not assigned to that area at that time.

Q. Is Mr. Spicer your superior game warden?

A. He is not. [372]

(Testimony of Carlos Getman.)

Redirect Examination

By Mr. Irwin:

Q. You were being detached from that area, were you, on temporary duty?

A. I was not assigned on that particular day. I was assigned to the Santa Maria area on the opening of duck season.

Q. But you knew Mr. Spicer did have Oxnard in his jurisdiction, so you gave him the substance of the conversation between Mr. McCormick and yourself? A. That is correct. [373]

* * *

EDWARD C. MAXWELL

having been previously duly sworn, was examined and testified further as follows:

Redirect Examination

By Mr. Irwin:

Q. Mr. Maxwell, you were asked yesterday on cross-examination whether or not you had had a phone conversation with Mr. Macklin on October 10. Do you recall that question? A. I do.

Q. Since the recess of court yesterday, did you obtain your long distance telephone calls from your office at Oxnard? [375]

A. Yes. I had them sent down to me.

Q. Do you have them with you?

A. Yes, I have them here.

Q. I have shown them to counsel. After re-

(Testimony of Edward C. Maxwell.)

freshing your recollection by looking at your toll calls,, are you able to state definitely whether or not you called Mr. Macklin on October 10?

A. I am.

Q. And what do you say?

A. I did not have any call or conversation with Mr. Macklin on October 10.

Q. As far as you know, did you have any further conversation with him other than the conversation that you related that took place when you went down to see him in his office?

A. That, and a subsequent conversation on the 24th.

Q. After October 22nd?

A. After October 22nd. [376]

* * *

EARL MACKLIN

called as a witness on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Irwin:

Q. Mr. Macklin, will you kindly tell us where you reside? A. Altadena, California.

Q. What is your position or occupation?

A. Assistant Chief Patrol for the Division of Fish and Game, State of California.

Q. While counsel is examining some documents, I am going to show you in a minute, I will ask you

(Testimony of Earl Macklin.)

a general question, whether or not the game wardens under your jurisdiction are required to make written reports to your office.

A. They are.

Q. And you preserve their reports in your office?

A. I do.

Q. Is Warden John Spicer, one of the witness for the prosecution, a game warden under your jurisdiction? A. Indirectly, yes.

Q. Did he send his report to your office?

A. He did. [377]

Q. And these reports are supposed to be a summary of their activities from day to day, is that it?

A. That's right.

Q. And they are furnished by them?

A. They are.

* * *

Q. (By Mr. Irwin): Mr. Macklin, I show you defendants' Exhibit H for identification, which consists of three sheets, each one bearing the heading, "Department of Natural Resources, Division of Fish and Game," and in each one, in the right-hand corner, it has a stamp, "Division of Fish and Game, Los Angeles," with a date on it, and I ask you if those are sheets from your office file showing the record furnished your office by Warden John Spicer as to his activities.

A. They are.

(The document referred to was marked Defendants' Exhibit H for identification.)

(Testimony of Earl Macklin.)

Q. (By Mr. Irwin): I wish to particularly direct your attention to the first sheet, on which the name appears, "John M. Spicer, County Ventura, week ending October 22, 1949," the stamp of the Division of Fish and Game, October 27, 1949. Does that indicate that was received in your office? [378]

A. It does.

Q. And that information contained on that sheet was furnished by Mr. Spicer?

A. Yes. It bears his signature.

Q. You recognize that as his signature?

A. That is right. [379]

* * *

(The document referred to was received in evidence and marked Defendants' Exhibit H.)

* * *

Q. Mr. Macklin, do you know Mr. Ed Carty?

A. I do.

Q. You also know Mr. Maxwell?

A. I do.

Q. Do you recall Mr. Maxwell coming to your office shortly before the opening of the hunting season in October 1949?

A. Yes. I think Mr. Maxwell was in there about 10:30 or 11:00 o'clock on the 19th.

Q. Two days before the hunting season opened?

A. Yes. [380]

* * *

Q. (By Mr. Irwin): Did you have a conversation with Mr. Maxwell? A. I did.

Q. Will you give us the conversation that you

(Testimony of Earl Macklin.)

had with Mr. Maxwell, to the best of your recollection?

A. Mr. Maxwell came into the office, and at that time we were very busy, and he was probably in the office about 30 minutes. During the telephone calls, I presume we conversed for about 10 minutes.

He seemed to be under the impression that it was okay or it was lawful to feed up to 72 hours before the season opened.

I told him there was no definite time, that that had more or less been thrashed out at a commission meeting in San Francisco on November 5, 1948, wherein Mr. Carty had brought up the question before the commission about feeding on private or commercial gun clubs, duck clubs, and two of the commissioners had taken exception to this statement that it was lawful to feed during the closed season.

Therefore, he asked Mr. Ralph Scott, the chairman of the commission did at that time, asked Mr. Ralph Scott for a legal opinion, not an official opinion in writing from the Attorney General's office, but advice and an interpretation of the federal regulation.

The commission took a recess, and after lunch came back, [381] and Mr. Scott informed the commission that he found nothing in the regulation which prohibited feeding during the closed season. However, the feed must be cleaned up before shooting started on any club, as that would constitute a violation of the federal regulation.

(Testimony of Earl Macklin.)

So I told Mr. Maxwell that I did not know where he got his 72 hours, other than he might have gotten it from a statement that Mr. Carty made to Mr. Scott.

He asked Mr. Scott if 72 hours before was a reasonable time, and Mr. Scott made the statement that probably that would be a reasonable time, but it didn't make any difference whether it was 72 hours or 86 hours, that the fact still remained that the feed must be cleaned up before shoting started.

So I informed Mr. Maxwell what had taken place at the commission meeting. I was merely quoting the advice given to us, or the opinion that was given to us by our attorney assigned by the Attorney General of California.

Then he stated that Mr. Edgerton had been on the club or he had contacted—Mr. Edgerton had contacted him, and they hadn't put out any feed, I think, after the 13th of October, which would be approximately nine or ten days before the season opened. I don't know whether it was the 13th, but somewhere in that length of time, at least, and he wanted to know if Mr. Edgerton had called me and discussed the matter with [382] me. I told him he had.

Then he wanted to know what I told Mr. Edgerton, and I told him that I had informed Mr. Edgerton exactly the way I had informed Mr. Maxwell, of what had taken place in San Francisco the year before.

Then he brought up Mr. Spicer, and he said Mr.

(Testimony of Earl Macklin.)

Spicer and the State wardens in that area—I think he singled out Mr. Spicer in particular and said that he had been unfriendly, he didn't come around to the club and come in as a friend, and he seemed to think that Mr. Spicer harbored some resentment against the club members for the reason that certain members of that club had taken part in retaining Mr. White on his job as Ventura County Game Warden.

I told him that I was surprised, that I did not feel Mr. Spicer harbored any resentment. However, he was in Los Angeles, had been working out of the office the day before or that day, and would be in the next day on a warrant detail, and that I would ascertain, if possible, if there was any resentment, and if there was any resentment on his part, that I would instruct Mr. Spicer to contact me when anything came up in the area which involved the enforcement for the club as a whole, on all the clubs in that area, not this one in particular, but all the clubs.

With that, Mr. Maxwell departed. That was the extent of our conversation in so far as it pertains to this case. [383]

Q. With reference to your conversation as to telling Mr. Maxwell about cleaning up the club before shooting, was the word "substantially" used by you or "reasonably"?

A. Yes. There was some conversation on that. In fact, I seemed to have had the impression from Mr. Maxwell that possibly the State wardens would

(Testimony of Earl Macklin.)

pick up the club on any technical violation, due to this controversy or friction, and I told him that wardens under my supervision and captains were instructed not to make technical arrests. That is the policy of the division as a whole. That is in the patrol department.

I told him that I felt if the club was reasonably cleaned up, that there wouldn't be any arrests made.

Q. You know Mr. Elder, do you not?

A. Yes, sir.

Q. After the 22nd of October, did you have a telephone conversation with him with reference to the events that took place on the 22nd at the Santa Clara Game Preserve?

A. Yes. I had a conversation with him, I think, on the Tuesday, the 26th.

Q. In the course of that conservation, was anything said between you about beans, as to whether or not they constituted feed?

A. I dont recall whether—I don't think so on that date, no. [384]

Q. Did you discuss it at any time with Mr. Elder? A. Later on, yes.

Q. Where was that? A. In my office.

Q. What was said by you or Mr. Elder with reference to beans being duck feed?

A. In my conversation with Mr. Elder over the phone, I asked how much feed was on the club, and he stated there was between three and four tons of barley and possible ten tons of beans.

I had called him or tried to contact him for the

(Testimony of Earl Macklin.)

reason that my chief in San Francisco had asked for a report, and all I was trying to do was get the highlights of what took place.

Later on, I think the following week or it might have been ten days later, Mr. Elder and Mr. Weischert, his immedate superior in Portland, Oregon, called at our office, and we discussed the amount of feed on the club, and especially the beans.

I made the statement to Mr. Elder that I thought beans were a very poor feed for ducks, and he agreed with me.

Q. How long have you been in conservation work? A. Twenty-three years.

Q. Was your remark to Mr. Elder based on your experience of 23 years? [385]

A. Somewhat, yes.

Q. By the way, coming back again for a moment to your statement to Mr. Maxwell, that you would instruct Mr. Spicer, as you have testified, did you talk to Mr. Spicer then?

A. Yes. On the 20th, I think, he returned to the office about 1:00 o'clock and turned in the warrant and his report. I mentioned the fact to him that Mr. Maxwell had been in and we had discussed certain things up there relative to the district, and I questioned him on this fact that Mr. Maxwell felt that he harbored ill feeling toward the club membership. Mr. Spicer denied that, and I suggested——

* * *

The Witness: Denied that there was any ill feeling toward the club membership.

(Testimony of Earl Macklin.)

We talked over the opening of the duck season, and I told him—I asked him if he had inspected the clubs up there as to the amount of feed that might be remaining on the clubs, and he said no.

I suggested to him that he might the next morning make a round of the clubs or check with the other wardens in the area to find out if they had inspected the clubs.

Q. Did you also tell him to contact you?

A. I told him I would appreciate it that he would contact me if anything involved the clubs as a whole. [386]

Q. Did you hear from Mr. Spicer between that time—that was on the 20th—did you hear from him? Did he report back to you anytime in the next two or three days?

A. No. I never heard anything from Mr. Spicer until I called him on the 26th to find out what had taken place on the 22nd.

* * *

Q. (By Mr. Irwin): I will reframe it. I think your previous answer, Mr. Macklin, was you didn't see Mr. Spicer until you called him in on, I think you said the 26th.

A. I called him on the phone on the 26th.

Q. On the telephone? A. Yes.

Q. At that time did you talk to him about how much feed was on the club? A. I did.

Q. What did he say?

A. Well, he was rather indefinite about the

(Testimony of Earl Macklin.)

amount of feed that was on the club, and I told him that I was preparing [387] a report for our San Francisco office, and I would like to have him make an estimate, at least, and he said, "Well, I don't know how much was on there." He said, "What did Elder say?"

I said, "Elder said between three and four tons."

He said, "No, I don't think there was that much."

I said, "Well, was it two tons?" He said, "No, I don't think so."

Well, I said, "was there a ton?" He said, "Well, somewhere between a ton and two tons."

Mr. Irwin: Cross-examine.

The Court: By "feed," you mean oats?

The Witness: Barley.

The Court: You are not including lima beans?

The Witness: No, I am not.

Cross-Examination

By Mr. Johnson:

Q. Mr. Macklin, referring to your conversation with Mr. Maxwell on the 19th of October, it is a fact, is it not, then, that you told Mr. Maxwell that all feed must be cleared up before anyone shoots on the club?

A. I told him that the feed should be cleaned up, as that constituted a violation, to shoot over a baited pond.

Q. You realize, don't you, that this is a federal regulation? [388] A. I do.

(Testimony of Earl Macklin.)

Q. You realize, also, from your experience in this field, that the Attorney General's office of the State of California is not the body to give the proper interpretation of the regulation, since it is a federal regulation? A. I presume you are right.

Q. Isn't it a fact, Mr. Macklin, that on the 19th of October, when you had a conversation with Mr. Maxwell, you told him that you would advise Mr. Spicer if anything occurred in the line of a feeding violation, to let either you or his superior, Captain Hecker, know. A. I told him, yes.

Q. Did you tell him that?

A. I told him, yes, that through the regular channels, when a warden in the field, where he is working under a captain, he takes that up with his immediate superior first.

Q. And you told Mr. Maxwell you would tell him to take it up either through channels with his superiors or directly with you?

A. Yes. I told him I would have him take it up with either his captain or myself, but preferably myself.

Q. You said either or?

A. Yes, that is right.

Q. Did Mr. Maxwell phone you on the Monday after the 22nd of October? [389]

A. He did.

Q. What did he say at that time?

Mr. Irwin: Just a minute. Object to that as not proper cross-examination.

(Testimony of Earl Macklin.)

The Court: Overruled.

Q. (By Mr. Johnson): Would you go ahead and answer, please?

A. Yes. He called me on the Monday following. That would be the 22nd—the 24th, I guess.

Q. What was said during that conversation, that telephone conversation?

A. He called me and he said, "Well, I guess we have all been arrested."

I said, "What took place?"

Then he told me about Mr. Elder and the State wardens coming in on the club and seizing their ducks and giving them notice of violation.

Q. Isn't it true he admitted there was feed on the premises on that day?

A. He said there was some feed, yes.

Q. Isn't it true you recevied a phone call on or about the 10th of October from Mr. Maxwell?

A. No, I did not. I, for a time, thought I had received a call. I was receiving so many calls about that time—— [390]

Q. Do you recall coming to my office and discussing this matter with me about a week ago, last Friday? A. Yes, I do.

Q. You recall telling me you had had a call on or about the 10th of October?

A. Yes, I did, and I thought I had a call from Mr. Maxwell.

Q. Now you say you were mistaken in what you told me at that time?

(Testimony of Earl Macklin.)

A. Yes. After checking my records, I know I was mistaken then.

Q. You said Mr. Maxwell admitted to you or stated to you in a conversation on the 19th of October that on the 13th of October feed had been put out, is that correct?

A. On or about that time. I don't recall the exact date.

Q. You mentioned something about it being nine or ten days before the season opened.

A. That's right.

Q. You didn't mean nine or ten days with reference to the 13th of October, because the season opened on the 21st.

A. The season opened on the 21st.

Q. Therefore, it would be eight days, would it not, if the 13th of October were the date on which Mr. Maxwell said they put out feed? [391]

A. I don't recall the date he told me. In other words, it was approximately ten days before. I don't remember exactly the date.

Q. But you think it might have been the 13th?

A. Could have been the 13th, 10th, 11th.

Q. You did mention the 13th in your direct examination. A. Yes.

Q. And if it were that, you recognize it would be less than 10 days? A. Yes, that is right.

Q. Referring to Mr. Maxwell's statement that Spicer had been unfriendly, didn't he also make the remark he felt a little hurt, or something to that effect, because Mr. Spicer had not accepted invitation to hunt on this private hunting club?

(Testimony of Earl Macklin.)

A. He made the statement the boys were always welcome there at the club and they could shoot anytime they wanted to.

Q. And that Mr. Spicer had never——

Mr. Irwin: Just a minute. May he finish his answer? Did you finish your answer?

The Witness: No.

Q. (By Mr. Johnson): Go ahead and finish. I am sorry.

A. I told him I had had inviations to the various private clubs up there and as a matter of policy we didn't always accept invitations to shoot on private or commercial clubs. [392]

Q. That is the policy of your office and the wardens under you?

A. Yes. That has been transmitted to the captains over a period of years at the annual meetings, and I assume that it has been passed on to the wardens in the field.

Q. Referring to your conversation with Mr. Elder and Mr. Weischert, you didn't state the date.

A. I don't remember the date when it was.

Q. You say Mr. Elder said lima beans are poor feed? A. He did.

Q. And you agreed with him? A. I did.

Q. When you say lima beans are poor feed, that doesn't necessarily mean they won't eat them, does it?

A. I believe a duck would have to be starved before he ate them, myself.

Q. A duck will eat them, if he is hungry?

(Testimony of Earl Macklin.)

A. Yes. He would have to be awfully hungry, though.

* * *

Q. (By Mr. Johnson): Isn't it true, Mr. Macklin, a duck will eat whatever is prevalent in the area he happens to be in? If it is lima beans, he will eat beans, and if it is rice, he will eat rice?

A. I wouldn't say so.

Q. If the duck is hungry enough?

A. If the duck is hungry enough, certainly.

* * *

Q. You say you told Mr. Spicer that if the area was substantially cleaned up, he was not to make any arrest?

A. I told him not to make any technical arrest.

Q. Assuming this is barley, which the testimony has indicated it is, showing you Government's Exhibit No. 2, would you say that would be a technical arrest if an arrest were [394] made on the basis of the grain in that picture?

* * *

A. If it only covered a very small area, I would say it was a technical arrest, yes.

* * *

Q. (By Mr. Johnson): Wouldn't you say if a hunter went up there in a blind 20 feet from there, that might tend to allure, entice and attract ducks so that he could shoot them?

A. It all depends on how much grain is there.

Q. The grain in the picture.

(Testimony of Earl Macklin.)

A. I don't think so.

Q. Are you aware of a federal decision which says that any baiting of ducks which directly or indirectly attracts them to the premises is in violation of the law? A. Yes.

Q. Are you aware there is a decision which directly says you don't have to place the feed directly in front of [395] the blind, but it can be in the area away from it? A. Yes, that is right.

Q. Would you say that would not be a violation in view of that decision?

Mr. Irwin: Just a minute. I object to that as argumentative. He has asked him for his opinion.

Mr. Johnson: I am asking him if in view of this decision, which he says he knows about, he would still regard that as a technical violation.

The Court: Overruled.

The Witness: It would all depend on the amount of grain.

Q. (By Mr. Johnson): That amount there.

A. I imagine that would be a violation if——

* * *

Q. (By Mr. Johnson): I didn't mean to cut you off, Mr. Macklin. Go ahead.

A. That would be a violation, I imagine, yes.

Q. Referring to Government's Exhibit No. 4, what would you say about that in the same regard?

A. What does that indicate?

Q. Assuming that it is grain, this white stuff here, [396] and on into the water.

* * *

(Testimony of Earl Macklin.)

Q. Assuming that were barley, would you say that is a technical violation?

A. If there was only just that amount as shown in the picture——

* * *

Q. Go ahead.

A. I would say it was a technical violation if that was [397] the only grain that was on the club.

Q. You would say that in spite of the decision of the Circuit Court of Appeals of the Federal Court, which you testify you know about?

A. There is a lot of violations.

Q. I am talking about this one decision.

The Witness: There is a lot of violations, technical violations, that we class as technical in the Fish and Game code.

* * *

The Witness: Just a minute. Where we issue a warning instead of making an arrest, where we consider it technical. Therefore, a lot of the law enforcement is up to the discretion of the officer. If every officer enforced the law to the letter, the court would be cluttered so we wouldn't have time to do anything.

Q. You are not criticizing your men, are you, for bringing in the arrest in this case?

A. No, I am not criticizing them at all.

Q. Showing you Government's Exhibit 6—excuse me—5, 6, 7, 8, 9, and taking you back to 3, assuming that the material you see on the ground in those scenes in those photographs is bait, would you

(Testimony of Earl Macklin.)

regard that as a technical violation [398]? Look it over.

Mr. Irwin: I am going to have to object to that, may it please your Honor, as compound and misleading, unless counsel will include what the testimony shows, that those pictures were several different shots within a radius of five to ten feet.

The Court: Let's have the question.

(The question was read by the reporter).

The Witness: Is this all barley? If that is all barley, I would consider it a violation.

Q. (By Mr. Johnson): I asked you, assuming it is bait, not with regard to whether it is barley or anything else. A. What do you call bait?

Q. I say, assuming it is bait. You are not to decide that. Assuming it is bait. You see the material on the ground. Is that a technical violation, assuming that is bait?

A. No, if it is spread all over the club, it is not a technical violation.

Q. You mean if that bait is spread up and down the road as shown in that picture, it is a technical violation?

A. No, I didn't say it was a technical violation.

Q. So you say that would not be a technical violation, if it were properly called bait?

A. That is right. [399]

Q. Do ducks eat barley? A. They do.

Q. Do geese eat barley? A. Yes.

Q. Do geese eat lima beans?

(Testimony of Earl Macklin.)

A. I have heard they do. Not from my knowledge.

Q. In your experience in your position over a number of years, do they eat barley?

A. Barley, yes.

Q. I mean lima beans.

A. I couldn't testify to that, because I have never seen them eat beans.

Q. On what do you base your observation ducks don't eat lima beans?

A. I have hunted in that particular area and killed lots of ducks, and I have never found any beans in the ducks in that area.

Q. You stated Mr. Spicer told you that there was possibly one ton of bait on the premises of this club at the time he made the arrest.

A. He said between one and two tons.

Q. Would that be a technical violation?

A. If it was all piled up practically in one spot or more or less spread out near the blinds to attract the ducks, I wouldn't say it was a technical violation, no. [400]

Q. But you don't claim to be an attorney and expert on what is the law on the subject?

A. No, I don't.

Q. So you don't really know what is the legal effect of such a baiting as you have described?

A. What is the question?

Q. You don't really know whether that is so or not, whether it would be a violation?

(Testimony of Earl Macklin.)

A. No, I don't. I was not there. I didn't see the grain and I don't know what took place.

Q. Referring to Defendants' Exhibit H in evidence, you stated that is a report submitted to you by Warden Spicer? A. It is.

Q. Did he discuss that report with you?

A. No, he didn't.

Q. So that you don't know what it means—may I have it a minute—you don't know exactly what it means here or what it includes, rather, under the date, October 16, where it says, "With Palmer U.S.F.S. to Santa Clara river bottom, gun clubs, and Hueneme-Pt. Magu. Return to river bottom and patrol up coast and Rincon and Casitas," you don't know what that means?

A. I assume he was with Mr. Palmer on the various gun clubs in that area. I would assume that from the wording of his report. [401]

Q. And on the 20th——

Mr. Irwin: The 22nd.

Mr. Johnson: The 21st, excuse me.

The Witness: The 21st?

Q. (By Mr. Johnson): The 21st and 22nd, then.

A. He indicates there on the report that he had checked the gun clubs in the Santa Clara river bottom area.

Q. It says a gun club. It doesn't say the gun clubs. A. No.

Q. On the 22nd, he says he went "to Santa Clara Gun Club checking ponds for grain."

A. Yes.

(Testimony of Earl Macklin.)

Q. And on the 16th, again it says "gun clubs." It doesn't say "the gun club."

A. It doesn't indicate any particular gun club.

Q. What does U.S.F.S. mean, "with Palmer U.S.F.S."? A. U. S. Forestry Service.

Q. What is the purpose of this report, Defendants' Exhibit H?

A. It gives a record of the field men's activities for the week.

Q. Isn't it for the purpose of obtaining operating costs? A. That is one purpose, yes.

Q. Isn't that the main purpose? [402]

A. No.

Q. It purports to be a narrative, doesn't it, of the general area covered? A. That is right.

Q. Mr. Macklin, I think your testimony was that Mr. Spicer told you on the 20th that he had inspected the gun clubs for grain and feed.

A. No. Yes, on the 20th, that is right. I asked him——

Q. This report is——

The Witness: I asked him if he had inspected the gun clubs in that area. I asked him first if the gun clubs had been feeding prior to the opening of the season, and he said he thought they had, and I had asked him if he had inspected them recently, and he said no.

Redirect Examination

By Mr. Irwin:

Q. With reference to Defendants' Exhibit H,

(Testimony of Earl Macklin.)

counsel asked you what is was. One thing it is supposed to be is accurate and correct to the extent of what is set down on those reports.

A. Yes, it is supposed to be accurate. [403]

Q. And you know the Santa Clara Gun Club, which the defendants operate, is one of the Santa Clara river bottom gun clubs.

A. That's right.

Q. I forgot to inquire, Mr. Macklin, are you also a deputy federal warden? A. Yes.

Q. You have been 23 years in conservation work, as you have testified, in response to counsel's question, and I believe you stated you don't feel confident to say what are the federal regulations or what are not, as far as the interpretation is concerned?

A. Well, we interpret the laws the best we can and——

Q. That's right. Had you finished? I don't want to be guilty of the same infraction.

A. Yes.

Q. With reference to the telephone call that you had from Mr. Maxwell on the Monday following, concerning which Mr. Johnson inquired, when Mr. Maxwell told you they had found some substance on there, didn't he say there were some beans on there, using the term "beans," rather than feed?

A. Yes, he mentioned the beans, that is right. I recall that. [404]

* * *

Q. In your conversation with Mr. Spicer when you called him on the 26th to find out what went on,

(Testimony of Earl Macklin.)

did the name Bud Elder figure in your conversation? A. He said that—as I recall——

* * *

The Court: The witness has not been allowed to answer the question. Will you read the question.

(The question was read by the reporter).

Q. (By Mr. Irwin): That just calls for a yes or no answer. I am trying to lay a foundation.

A. Well, yes.

Q. Very well. Did his name figure in the conversation with reference to any date prior to October 22nd, which is [405] the date on which these events took place?

A. I think he told me he called Mr. Elder, or he had called Captain Hecker Friday night, and Captain Hecker had instructed him to call Mr. Elder.

Q. Was there any further conversation as to any prior contact with Mr. Elder? A. No.

* * *

The Court: Mr. Bedwell testified that there were approximately 15,000 ducks on the ponds. I assume that was before the season opened. Do you have any idea, based upon your experience, how much food ducks will eat in tons and sacks of barley or feed?

The Witness: Well, if there was 15,000 ducks in that club prior to the opening of the season, they would have ate several tons of grain within three or four days time. A duck eats, I don't know exactly the amount a duck would eat, but probably, conservatively, at least a half a pound a day. [406]

* * *

LES ARNOLD

called as a witness on behalf of the defendants, having been first duly sworn, was examined and testified as follows: [407]

Direct Examination

By Mr. Irwin:

Q. Mr. Arnold, where do you reside, sir?

A. Bakersfield, Kern County.

Q. What is your business or occupation?

A. State game warden.

Q. How long have you been so engaged?

A. Twenty-four years this coming August 1.

Q. Do you know Agent Elder?

A. Very well.

Q. Did you have occasion to see him on October 20, 1949? A. I did.

Q. When and where and under what circumstances did you see him?

A. He came up to Bakersfield to go with me in the duck fields.

Q. Was he with you most of that day?

A. All day.

Q. Where did you return that evening?

A. On the 20th?

Q. That's right. Did you go to your home?

A. Yes.

Q. After you returned to your home, did the telephone ring that evening? [408]

A. Not on the 20th. The 21st.

(Testimony of Les Arnold.)

Q. I beg your pardon. On the 21st, was he with you on the 21st. A. He was.

Q. Did you return to your house on the 21st?

A. We did.

Q. Did a phone call come into your residence that evening? A. Yes, sir.

Q. Did you answer the phone? A. I did.

Q. Did you ascertain who was on the phone?

A. Yes.

Q. Who was it? A. Warden Spicer.

Q. Whom did he want to talk to?

A. Bud Elder.

Q. Did he talk to him? A. He did.

Q. After he talked to him on the phone, did Mr. Elder make any statement to you?

A. I asked him—he said he had to go down to Ventura. I asked him what was up. He said that Spicer, the boys had found some grain on the Carty club.

Q. Did he leave your home? [409]

A. We finished eating and he left the house, I imagine around 9:30, 10:00 o'clock that evening.

Q. Did you again see Agent Elder on Sunday, October 23? A. I did.

Q. Did you have a conversation with him regarding his trip over to the Ventura area?

A. Yes.

Q. Was anything said about feed?

A. Well, he was to meet me on Sunday morning

(Testimony of Les Arnold.)

in duck clubs south of town, and when we got there, I asked him what he did over there. He said, well, they pinched the Carty club.

I said, "How much grain did you find?" He said, "Oh, three or four bucketsful and a lot of beans."

I asked him—then he said, "Well, I am not so excited over the beans, as I don't figure these ducks will eat beans."

* * *

Cross-Examination

By Mr. Johnson:

Q. You are sure Mr. Elder didn't say he could have scooped up three or four buckets? [410]

A. He said, "We found three or four bucketsful."

Q. He stated he found——

A. He said, "We found three or four bucketsful."

Q. He said, "We found three or four bucketsful"?

A. Well, he said he found—yes, that's right.

* * *

EDWIN L. CARTY

called as a witness by and in his own behalf, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Irwin:

Q. Mr. Carty, where do you reside, sir?

A. At Oxnard, California.

(Testimony of Edwin L. Carty)

Q. Do you hold any official title in the Oxnard government? A. I am mayor.

Q. How long have you held that position?

A. Six years.

Q. Have you held any other official positions in the State?

A. I am the past president of the League of California Cities, past president of the National Association of Municipal Legislators, and various boards and commissions.

Q. With reference to conservation, have you been interested in conservation work?

A. For some 30 years.

Q. What positions have you held in connection with conservation?

A. Well, I have been president of a [412] good many sportsmen's clubs, Ventura County Gun and Rod Club, the Southern Council of Wardens, Southern California Sportsmen, three years, and State Sportsmen's Council. I have been Fish and Game Commissioner for three appointments since 1939 and I have got five years more to go, under two governors. I am on the International Board of the Game and Fish Conservation Commissioners, and quite a few other clubs, the Izaak Walton, Duck Association of California, and so on. A lot of them.

Q. Are all these activities, with the possible exception of mayor, and I haven't asked you that, are those positions you have held without remuneration?

A. That's right. They allow expenses, but all

(Testimony of Edwin L. Carty)

these jobs are a public service and they cost me money.

Q. Directing your attention to October 21 last, you are a member of what has been called the Santa Clara Gun Club?

A. I feel I am a privileged member there.

Q. Why?

A. Because it is a club where we do not pay rent. We have no lease on it. We don't pay the water bill. It is all composed of relatives of the McGrath family. The Douds, their mother was a McGrath. The McCormicks, their mother was a McGrath. There are just a few of us that are not relatives. We incorporated it as a club so as to protect the McGrath family against accidental deaths, so we can carry insurance. [413]

Q. Directing your attention to October 22nd, you were not there on the opening day of the season?

A. Yes, I was.

Q. Then let's take up the 21st, the opening of the season. What did you do then?

A. I went to the club about 11:00 o'clock on the opening day, and that is the first time I had been on the club in nine months, since the previous January.

Q. Using that Exhibit A there in front of you, kindly tell us how you went on the club on the 21st and where you went?

A. We first draw for blinds. We got a little cook wagon where we draw for blinds. Bob Maulhardt and I shot together. They are double blinds.

(Testimony of Edwin L. Carty)

We went out this road and there was a lot of threshing dump wagons right here that you can see. We crossed by them, and our blind was 20 and 21. That is on levee 2 in the chart there.

When I got here, there was beans, oh, about 75 yards from right there to about half-way between levee 2 and 3. I noticed that.

I said to Bob, I said, "My gosh, those beans look bad there." You could see evidence of cows. There was cow manure all through there and a lot of trash, and in the pond right here in the corner, there was a big circle of material floating on the water. I said to Bob, "I wonder what that is." So [414] I waded in and picked up a handful of it, and I thought it was mustard pods, and Bob looked at it and he said, "That is radish pods." That had floated in here and was in evidence all along this levee 2.

As we got up close to our blind, there is about five or six inches of Bermuda grass all over those ponds and there is a cow pasture where there had been cattle until a few days before the season, and there was a few kernels of grain in the grass, and there was this radish pods and chaff that floated in the water along the edge of the pond.

It was probably, oh, 15 or 20 minutes of 12:00, and the shooting season started at 12:00, so we threw out a few decoys on the water on each side of the pond here. At 12:00 o'clock we started shooting. Well, there was thousands of birds in the air, and we were just picking big birds. We usually try to get

(Testimony of Edwin L. Carty)
the bull sprigs. That is the male sprig, which is the best eating duck. The limit being 5, we are going to get the good ducks, and not teal and widgeons and the smaller ducks. In about an hour, we had our limit. We counted our 10 birds and we picked them up.

Then Bob and I proceeded back to the cook house the way we came out. We went here to our little wagon, that cook wagon where we left our decoys, and we put them in the sack. We carry them on our shoulder with our gun coats. Then we proceeded to the yard where Jack Bedwell was waiting, and one [415] of the first things I said to Jack was, "You know, those beans out there look bad. I know ducks won't eat them, I know that from past experience, but they should be covered up." He evaded answering. He did not say anything.

Then I said, "Check my ducks," which he did, and I showed him my duck stamp and everything.

I said, "Check everybody that comes off. They know what the regulations are and they know how many they are allowed to get and if anybody is over the bag limit, just arrest them. There is no argument about it, because everybody knows what the law is. Five ducks is the limit."

Bob Maulhardt had his car parked here and Bob drove up the road to where we were, and I said, "Check Bob," and so he went to Bob's car that his ducks were in.

Then in the meantime Mr. McCormick and one of the Douds came in. Usually, when we are through

(Testimony of Edwin L. Carty)

shooting, we get off the marsh so that we don't interfere with the other fellows who are shooting. So they came in and they had their ducks with them.

Then I said, "You know, all you boys are welcome to hunt any time you want to here." That has been understanding up there all the time. I belong to other clubs there, and the wardens are allowed to shoot any time they want to on any of the clubs.

Then McCormick said, "You can use my gun, if you want [416] to."

I was leaving for San Francisco the next day, because we had a Fish and Game Commission meeting coming up, and I informed him about the condition of the ducks, the number of ducks around the place, and we had an informal discussion there for four or five minutes, and then I put my ducks in the car and went on home.

Q. I believe you stated that you noticed these beans. I am going to show you Government's Exhibit 8, which has heretofore been introduced in evidence, and, directing your attention to that, I will ask you if that refreshes your reellection as to what that represents.

A. That is right. Those are the beans on the south road in the west corner. They run up from about levee 1 to between levee 2, and you see how it ended there. They dump them out there in a truck and this is cow manure you see over there. That is some beans there. I didn't see any grain there.

(Testimony of Edwin L. Carty)
There was these pods and there may have been grain there, but there was no four or five bucketsful.

You see the birds in the picture and there are 800 mud hens that are there all the time. When the shooting starts, the ducks take off, but the mud hens just get around here on the edges when the shooting starts, and when we leave, they go back in. They don't leave the ponds.

The grain, if there has been grain there, was picked out. [417] The fact that the mustard pods were along the road and the sticks and trash, show there was some grain put out there, because they throw it out with a seeder when they go along, and they go out here and throw it and make a circle around, and then they go back and down the middle road, and they throw the grain on that side. That is why there was some grain in the Bermuda grass that the ducks and mud hens couldn't find. That is probably the reason it was left there.

There was nothing on this side up here, because here is a big field of peppers. This is all peppers in here, and we had been warned that we didn't want the mud hens to pick holes in the peppers. That was the reason the feed was put on this side to keep the mud hens and birds on the other side, the south side. Here is where they came around with feed, but not in this area at all. There wasn't anything put there at any time. There was forty 90-pound sacks put out in this area some 10 days before.

Q. Having previously shown government's coun-

(Testimony of Edwin L. Carty)

sel Defendant's Exhibit I for identification, I ask you to look at that, Mayor Carty, and tell us whether or not you have seen any of that before.

A. This is a regular run, the way it comes out of the sacks. There was a half a sack in my car that happened to be left there. There was 80 sacks we bought, and there was one [418] sack that the boy wanted to feed his chickens with on the ranch, and that is the reason we had this half a sack left. He had already fed half of it.

We paid $1.75 for it. It was very poor quality, very poor. You can get it for anywhere from $1.75 to $5.00 a hundred-pound sack or a 90-pound sack. The reason we got it is that if the beans were good duck feed, we would never buy grain and pay any $4.00 or $5.00 a sack for it when we can get the beans for nothing, because all of us boys are ranchers and we have lots of that stuff around. None of the other clubs would use grain, either, if the ducks would eat the beans, because for 10 or 12 dollars a ton, you can get all the beans you want, the culls and things.

Q. Further directing your attention to Defendant's Exhibit I for identification, you mentioned earlier in your testimony that you saw a good deal of radish and mustard seed and chaff. Do you see anything like that in this Defendant's Exhibit I?

A. That's right. It is very evident. It is very evident that the pods are of wild radish. With the dry farming that we are doing now, that gets start and it spreads so much that a lot of the grain fields

(Testimony of Edwin L. Carty)

up there are practically all full of wild radish, which makes it very poor quality, and it is very expensive to clean it out. If you would run that through a cleaner, it would cost a dollar or so a [419] sack to clean it. I have been a rancher all my life, until the last few years, and I know what I am talking about.

Q. Directing your attention to Government's Exhibit 10, which is identified as grain picked up on the Santa Clara Preserve, do you see any difference between that grain and this?

A. Yes. Evidently, they didn't pick up the trash or the pods that are in this that they threw out.

Q. I believe you testified you noticed some of this trash, as you refer to it, mustard seed and wild radish, and so on, floating on the edge of the pond, you had gone down into the pond and scooped up some of it, and so you are able to identify it?

A. Yes. I went all along there, and there was these radish pods, and so I said that it looked like mustard, and Bob picked up a handful of it and he said, "No, that is wild radish," and I agreed with him when I looked at it closer, but the mustard pod is a lot like that. This wild radish is very prevalent in the grain fields in poor years, where you get a poor stand, and that is just due to lack of rainfall.

Mr. Irwin: I offer Defendant's Exhibit I marked for identification in evidence. [420]

* * *

(Testimony of Edwin L. Carty)

(The photograph referred to was received in evidence and marked Defendant's Exhibit I.)

Q. (By Mr. Irwin): Now, directing your attention to the 22nd day of October, 1949, you went to the Santa Clara Game Club on that day, did you?

A. That is right. I had a guest coming up to hunt with me, a Mr. Stevenson from Santa Monica, that morning, and I was leaving for San Francisco, but due to the fact that I had a guest, I told him to come to the house about 4:00 o'clock and have breakfast, and then we would proceed to the club.

We drove down there about 5:00 o'clock. Shooting time that morning, I believe, was about 5:34. We had our breakfast and proceeded down to the club to the cook wagon, where we drew for our blind.

All the fellows gathered there, probably a half hour before shooting time, and I was successful in getting a blind that——

Q. Will you use the big exhibit there, Defendant's Exhibit A?

A. I got blind 11 and 12, which is one of the best blinds in the club, due to the fact that the ducks congregate down here. You can see these ditches right here and here, and here is fresh water there, the irrigation stand lines, and the heads are right here, where you open it up and let the fresh water in. The ducks smell the fresh water, and that is where they come in, and usually you can get your

(Testimony of Edwin L. Carty)
ducks a lot quicker, and you get the bigger ducks, too, the sprigs.

When I drew 11 and 12, I told Steve, "We will take my car and drive around Gonzales Road and come in on the road right there," and so we came in, drove right up to here, and I pulled off the side of the road and parked my car and got the decoys and gun shells, and proceeded over to the fence. The gate was all wired up, so we climbed over the fence and walked to this levee. The dike there is No. 4, dike No. 4.

These ponds we have dried up on account of the water getting into the fields and injuring the crops in the field right over here, and we don't want to do that, so we keep the water away from the road for that reason.

These are two good ponds. You will see they are full of water right up to the corner. This blind sets in there probably 100 yards from the south road and probably 20 feet from the dike.

Q. You don't mean 100 feet?

A. No, 100 yards. We put out our decoys. It was still dark then, just kind of breaking dawn, because you shoot a half an hour before sunrise. We put the decoys on both sides of us. There were thousands of birds in the air. There are two clubs over here, and here is one here, and then a big [422] one across the valley, and when the shooting time starts, all the birds go into the air, and they are moving across this area until they get out over

(Testimony of Edwin L. Carty)
the ocean, and then they stay there the rest of the day, except when it is rough and windy.

So we counted our ducks as we shot them, and I would say an hour went by, and the last bird I shot, a bull sprig, fell off in this field here, so I said to Steve, "We have got our bag limit and we might just as well go in and let some of the other boys move into our blind where there is better shooting."

I said, "You go and pick up on the west side and I will pick up on the east side, and I will get the ducks that went in the field."

So I proceeded across the field and picked up two ducks as I came, and right across here is the gate and Bud Elder and John Spicer drove up, and I walked over and shook hands with Spicer and Bud Elder was there and he was very nervous, quite nervous, and he said, "I warned you, I warned you, I warned you." He said that at least five times.

I said, "Bud, what did you warn me?"

He said, "I warned you about baiting last year."

I said, "What do you mean? Do you mean the time Bud Spicer called me up at 10:00 o'clock and said, 'Your club is closed?' "

I said, "Closed? Why?" [423]

He said, "You know those seven sacks"—we had the cook wagon right in here that year. He said, "You know those seven sacks left over from the feeding in the middle of the season that had been rained on and swelled up?" He said, "I talked to the Mexican last night and he said he had dumped those seven sacks out."

(Testimony of Edwin L. Carty)

John said he asked the Mexican fellow—he could speak very little English—who it was that dumped them out, or I mean who it was that told him to dump them out, and he said Jimmy McCormick.

Q. Excuse me, Mr. Carty——

Mr. Johnson: I don't think it is quite clear to the jury and the court what he is talking about, what time this is.

* * *

Mr. Irwin: As I understand it, the Mayor is answering Mr. Elder's question about the warning.

The Witness: That is right.

Mr. Irwin: An event that happened in 1948, which you have had your witnesses refer to without explaining it.

Mr. Johnson: That's right, but I just want to know what [424] date this is. I know it now and I thank you very much.

Q. (By Mr. Irwin): Go ahead.

A. So John Spicer said, "Bud Elder will be by this afternoon and we will stop in at your office."

So I says, "In the meantime, I will check with Jimmy McCormick and see what it is all about."

So I got Jimmy McCormick on the phone, who kind of keeps an eye on the club, and his mother is a McGrath and farms all this land, and he said, "Those were spoiled. They were rained on and there were thousands of ducks coming in there and they were all hungry."

We don't shoot every day out at the club there. There is one cub in the neighborhood that shoots

(Testimony of Edwin L. Carty)

twice a week and another shoots four times a week. All we take is 10 birds a week, five each time, and they take 20.

He said, "I told him to dump them out tomorrow morning and that feed would be all gone because we don't shoot until Sunday."

That would be from Thursday to Sunday.

Well, that was the answer, and so I was waiting for them, but they never showed up that afternoon at all, Bud Elder and Spicer, at my office.

Q. You are discussing there what you said to Elder in reply to his statement to you that he had warned you? You are recalling with him what had happened, are you? [425]

I said, "That is the warning that you consider was the warning that you gave me last year as far as baiting the ponds is concerned?"

Of course, in my opinion, there was no question it was a violation. I know you are not supposed to bait during the season.

Q. That was last year, in the 1948 season?

A. That's right. So we didn't shoot until probably three days later, and then Bud says to me, "You know, the only reason I let you go back to shooting last year is you were going to have a priest as a guest."

I said, "I have never had a priest as a guest."

That was the statement he made to me.

I said, "Our boys quit 10 days ago feeding on the instructions that Hap Maxwell got from Edgerton,

(Testimony of Edwin L. Carty.)
that all the clubs were quitting approximately 10 days before the season feeding."

So I could see he was still very nervous and there was no use arguing, but I said, "I would like to know where the responsibility of our State Wardens starts and stops. We have got 166 of them and they enforce about 90 per cent of the migratory bird laws," and I said, "I guess we will have to go to court. What else can I do?" I said, "Why didn't you arrest us yesterday? You let us shoot today."

I knew Jimmy McCormick had asked Getman to check the [426] club so I felt everything was all right on the club. I was in Ojai the day Jimmy McCormick talked to him, because my son was playing football on the Villanova team, and Mr. Getman has a son in Villanova, although I was on the bank and did not talk to him but Jimmy was talking to him.

On opening day, there was wardens lined up all around here. There was a couple of cars in here, there were a couple of wardens cruising around on this road here. There was evidence of wardens around there all the time, and I have been checked more in the last two years than I have in 40 years.

Here two years ago, John Spicer and Edgerton had evidently been watching me shoot ducks right here on this pond. That time, I didn't go in there until 10:00 o'clock, and they came around here, and they met me at the gate. The limit was four, and I laid my coat out and everything, because I knew they thought I had over the limit in my bag,

(Testimony of Edwin L. Carty.)

so I asked them to check, and they checked the ducks, and I said, "Check my decoy bag and everything." They never checked anybody else at the club but me.

That morning they were in the trees over here, and they even were in the house and asked Mrs. McGrath if they could hide—not hide, but park behind these trees and watch the club. They were doing that, they were standing there and watching the hunters with binoculars, and Mrs. McGrath said, "What are you two doing there? Are you trying to spy on my [427] husband there?"

He was shooting on that opening day then, too. If you are that close and using high-powered glasses, you can see everything that goes on. You can even see the beans out there when you will use those glasses, the white reflected from them.

So I went back then after this discussion and cut across here, and I yelled to the fellows to stop shooting, that Bud Elder and Spicer had said we were violating the Migratory Bird Act by feeding ducks, shooting over baited ponds.

So they came up here, four or five of them came in there, and so we brought up all the decoys and picked up our ducks and proceeded on out this way.

Stevenson and I got in the car and were were at the gate here, and Spicer—no, Spicer had gone then. There were the three other wardens, there, Edgerton, Ernie Bedwell, and his father Jack. They were waiting here for us, right here.

I said, "Well, you honor me by having the whole

(Testimony of Edwin L. Carty.)

force present. Here are five wardens, counting the other two fellows."

So we handed our ducks and decoys and our coats and all our guns and stuff over this fence, and when we got over there, my car was sitting here, and so I went on over to my car and Edgerton came over to my car and he says, "Mr. Carty, Bud wants me to take your ducks." He was very apologetic about it. [428] He says, "Mr. Carty we could close all the clubs up technically. They all have a little grain on them."

I said, "I don't know about that, but when they get that technical, that they are closing it for a few handfuls of grain"——

Along this road, when I came out, there was the mustard pods and stacks of trash all along here. Wherever I walked, you would find that. They ate the grain and left the pods there, and when you first glanced at them, it did look like feed. I didn't know until I picked it up to look at it, and I couldn't figure what the devil that was.

So I took the ducks off my strap. We have a strap that we carry the ducks with. I handed it to them and they went over here then. They were putting tags around the necks and putting our names and identification tags on them.

Then Steve and I—Steve had left his car in the yard, and there were several of the other boys came along, and one of them had his car down here. We drove around into the yard and Steve got into his car, and then we left and went on home. I had to go

(Testimony of Edwin L. Carty)

to my office and get ready to leave for San Francisco.

Q. Now, may I direct your attention to a statement made by one of the other witnesses for the prosecution, I forget which one, to the effect that you were supposed to have said not to arrest you, to arrest the club. Did you make [429] that statement?

A. No, I did not, and I would not, because I know you can't arrest a club. You have got to arrest people. That would be silly on the face of it.

Q. Directing your attention to Government's Exhibit 4, which was identified as having been at the approximate intersection of the fourth dike and the south river road, Mr. Johnson stated that that was about 20 feet from the blind where you were shooting. Did you see any condition like that at the intersection of dike 4 and the south river road?

A. No, I did not, and he couldn't identify that as grain. I think if the jurors would see that, they would know what I am talking about, what I mean by radish pods, how they look.

Q. You are referring to Defendant's Exhibit I?

A. That's right. If there was so much grain, like they say there was, they would certainly have more pictures than that to show. There could be one or two pounds of grain or trash like that thrown out in here and the mud hens and ducks pick out the grain. I wouldn't bet my life that is all grain there. There might be some grain, but I certainly

(Testimony of Edwin L. Carty)

never saw any grain here. I doubt if that is levee 4, because on levee 4, that is a very bare levee. The other levees have five or six inches of Bermuda grass, but this one [430] doesn't have that. It is just like a lawn that has been mowed. There was no grass there. It was very clean. By the levee on that dike here, there was some kernels of grain in that deep Bermuda grass, but mostly it was this kind of stuff.

Q. As you see, in this Defendant's Exhibit I, you can see some kernels of grain mixed up with chaff and radish seed and this is the way——

A. This is the way it was when it was down there. That is why we got it for $1.75. It has never been recleaned. [431]

* * *

Direct Examination
(Continued)

Q. (By Mr. Irwin): I have previously shown to Mr. Johnson Exhibits I, J, and K for identification, Mr. Carty. I show them to you now, sir, and ask you first as to the Defendants' Exhibit I for identification, what that represents.

A. This is dike 4, looking out from the 11 and 12 blind.

Q. I correct my last question, Mr. Carty, to make [434] that Exhibit L for identification. You say this Exhibit L for identification is what?

A. That is looking out from blind 11 and 12. My car is on the south road there.

(Testimony of Edwin L. Carty)

Q. When you say from the blind, I see two large circular discs that appear to be on a concrete base there. What are they?

A. Those are 36-inch concrete tile blinds with the caps that we put on top of the blind.

Q. Are those, then, what we have been referring to and hearing so much about as blinds?

A. That's right, and it is 96 yards from here to the road, looking south.

Q. You say that is dike 4?

A. That's right, and it has got a little clover on it that has come up since.

Q. I show you Defendants' Exhibit J for identification. What is that, sir?

A. That is looking north from the south road, and my son is standing on top of the blind.

Q. That is also dike 4?

A. That is right. The water had been running over this dike, so they took it kind of up to the blind to fill it up so the water wouldn't run from this pond to this pond.

Q. Now, I show you Defendants' Exhibit K for identification. [435] What is that, sir?

A. K is from the middle road looking south to the south road, which is about 200 yards. It is 196, to be exact. One hundred yards from the middle road to the blind, and then 96 from the blind to the south road.

Q. Those measurements you gave us were taken under your direction? A. That is right.

* * *

(Testimony of Edwin L. Carty)

Mr. Johnson: Where was Exhibit K taken, Mr. Carty, from what dike? Would you like to see it?

* * *

The Witness: That is dike 4. That is in the middle road looking toward the south road.

* * *

(The photographs were received in evidence and marked Defendants' Exhibits J, K, and L.)

Mr. Irwin: One other thing. I have shown this to government counsel, may it please your Honor. This does not properly belong to this witness, but should be considered in connection with Mr. Maxwell's testimony. He has stated he will stipulate with me that the exhibit I am about to have marked——

* * *

(The document referred to was received in evidence and marked Defendants' Exhibit M.)

* * *

Cross-Examination

By Mr. Johnson:

Q. Mr. Carty, how long have you been hunting migratory waterfowl?

A. Oh, practically all my life, since I was big enough to carry a gun, eight or 10 years old. [437]

Q. That would be how long, approximately?

A. I am 52 now. About 41, 42 years.

Q. On the 21st of October, I think you stated that you were in the blind on cross dike No. 2, was it? A. Yes, that is right.

(Testimony of Edwin L. Carty)

Q. I am looking for Government's Exhibit No. 1.

A. It is right under here.

Q. Could you please show me where that would be on cross dike No. 2?

A. The way you have got it numbered, it would be this one here.

Q. How far up the cross dike would it.

A. About in here.

Q. How many yards this side of the middle dike would you say that is, that is south of the middle dike?

A. It isn't very far. These dikes are 200 yards long. Probably 25 yards or so.

Q. Approximately 25 yards south of the middle dike. Thank you.

Now, you say that on the morning of the 21st, you came out to the club with Mr. Maulhardt, was it?

A. No. I came by myself, but Mr. Maulhardt was there.

Q. You saw some beans there?

A. You mean I came to the club by myself, but I went [438] to shoot with Mr. Maulhardt. In other words, we double up when we draw.

Q. But you saw some lima beans on the premises on the 21st?

A. That is when we crossed the road there going up to dike 2.

Q. And later on you saw Mr. Jack Bedwell on the 21st?

A. That is right, when we came out in the yard.

(Testimony of Edwin L. Carty)

Q. To both of them, you made the remark that the beans looked bad? A. That's right.

Q. Why did they look bad? Why did you think they looked bad?

A. Because they showed up in that road and they are not duck feed, I know from past experience, because I have had a duck club of my own at one time.

Q. If they aren't duck feed, why would they look bad?

A. The fact that somebody might think that they are feed.

Q. In other words, you think there might be some doubt as to whether they are duck feed or not?

A. That's right.

Q. So you are not positive they are not duck feed? [439]

A. I am positive from past experience. I have had them on my Ocean View Ranch years ago. I dumped them out and they just rotted there and the ducks didn't eat them.

Q. But you realized that other people may disagree with you on this particular matter?

A. They might think they are feed, just like it is being contended now.

Q. You also stated near your duck blind, I assume that was the one on cross dike 2, approximately 25 yards of the middle dike, as you have testified, you noticed a few kernels of grain in the grass. A. That's right, in the Bermuda grass.

Q. How many would a few be?

(Testimony of Edwin L. Carty)

A. Well, you could take a handful and spill it along over 15 or 20 yards, and you would have kernels every five or six inches, if you looked down into the grass very closely.

Q. Showing you Government's Exhibit No. 2, which, according to some testimony in this case, represents grain, and assuming that it is the grain, would you call that a few grains?

A. That would be about four or five pounds of grain.

Q. Would you call it a few grains?

A. No.

Q. What would you call it?

A. That would be four or five pounds of grain, I would [440] say.

Q. Assuming again, under the premises I have stated to you, that that is grain, would you say that that is a violation of the law, as you understand it, in regard to baiting?

A. If that was on 40 acres of land, there would be a question in my mind, if that is all the grain there was, four or five. Where is that supposed to be?

Q. I am not sure. I think it is at cross dike No. 4. I could be wrong.

A. That could never be at 4, because there is no water here. This pond is full of water.

Q. But you think that would be a violation, at least, in that area, if that is grain?

A. If that is grain.

Q. Now, you also stated that on the south side of

(Testimony of Edwin L. Carty.)

the premises feed was put out to keep the mud hens from interfering with your hunting?

A. Did I say——

Q. Is that what you said? A. When?

Q. In your testimony on Friday last.

A. I don't remember saying anything about that.

Q. What was the feed put out for?

A. Feed is put out for ducks.

Q. But what was your testimony with regard to mud hens? [441]

A. I said there was four or five thousand ducks and about 800 mud hens in the area at noon when we went out to shoot.

Q. Well, I may have got my directions wrong. What you testified to was that the reason the feed was put out on this side was to keep the mud hens and birds on the other side, the south side?

A. Out of the pepper field, the big pepper field to the north, because the people who have the peppers in this big field were afraid that the mud hens would pick holes in their pepper.

Q. What kind of feed was this that was put out for that purpose? A. The grain was put out.

Q. That is the grain that has been introduced in evidence as Defendants' Exhibit I?

A. That is right.

Q. In the box here? A. That is right.

Q. With the pods in it?

A. That is right.

Q. What kind of sacks was this feed contained in? A. Regular grain sacks.

(Testimony of Edwin L. Carty.)

Q. How big?

A. They run about 110 in good grain, and about 90 pounds [442] could be in the same sack.

Q. How big are the sacks in size?

A. They are about that wide and about that high.

Q. You say they run about 110. What do you mean?

A. If it is good grain, heavy grain, it will run about 108, 110 pounds. Light grain, threshed grain, will run less in weight.

Q. This would be lighter than ordinary grain, wouldn't it? A. That is right.

Q. This was, then, the barley with trash and pods in it, as you have testified about putting out?

A. That is right.

Q. Of course, you recognize that mud hens are also migratory birds, don't you?

A. That is right.

Q. So that such feed put out, no matter for what purpose, would be a violation if you were shooting over it during the open season?

A. Well, if there was an unreasonable amount, I would say yes.

Q. If you were shooting over an area baited with this feed, it would be a violation?

A. It is a matter of opinion what would be—if there is a few grains around, I wouldn't consider it a violation. [443]

Q. You don't think that is a matter of opinion, do you? That is a matter of law, isn't it?

(Testimony of Edwin L. Carty.)

A. I don't know.

* * *

Q. (By Mr. Johnson): You are familiar with the regulations, state and federal, concerning shooting and taking of ducks and geese, are you not?

A. As far as I can keep up with. It has never been clarified for years. That is the big argument we have.

Q. You knew you could never shoot over any ponds or area as long as feed was on them, didn't you?

A. Not necessarily. You can have feed on the pond. You can raise all the feed you want, as long as you don't mow it down. You can flood rice and barley, and it is still within the regulations.

Q. That is true, but I am talking about placing feed out. You knew as long as such feed was placed out on the area you couldn't shoot during the open season? [444]

A. That's right, if there was any quantity.

Q. If on the 21st of October, there was feed out there, it was unlawful, and you knew it, to shoot?

A. The few kernels of grain I saw around there, one handful scattered through the grass.

Q. We will get to that in just a moment.

A. I wouldn't consider that a violation or any intent of violating any law. [445]

* * *

Q. (By Mr. Johnson): Now, showing you Government's Exhibit No. 10, which purports to be a

(Testimony of Edwin L. Carty.)

sample of barley taken from the premises of the Santa Clara Hunting Club on the 21st of October, would you say that is the barley that was put out, as you testified, in forty-one 90-pound sacks?

* * *

A. If it is, it is certainly cleaner. There are very [447] few pods, if any, in here, or radish seeds, and the dirt in there, they probably didn't gather up the radish pods and the trash with it. That is fairly clean barley.

Q. Is that a radish pod, as you understand it, that little purple thing in there?

A. Yes, that is one.

Q. You say there were more of those in the barley than that? A. Yes.

Q. You don't think the game wardens strained the stuff before they brought it in here?

A. Not necessarily.

Q. You don't think they would have the stuff strained before they took it as a sample?

A. I don't know what they would do. They have done other things.

Q. Referring to your testimony with respect to the 22nd of October, you state you were in a blind on cross dike No. 4? A. That's right.

Q. Would that be a concrete blind which shows in Defendants' Exhibit L? A. Yes, 11 and 12.

Q. And that is how far from the south road?

A. Ninety-six yards. [448]

Q. You stated in your direct testimony that Mr.

(Testimony of Edwin L. Carty.)

Elder told you you had been warned before. As a matter of fact, that was true, you had been warned before, hadn't you?

A. I wouldn't call that a warning the year before. In other words, as I explained, he kept saying, "I warned you, I warned you, I warned you," and I referred him back to if he considered was a warning was the year before when the seven sacks of spoiled barley had been dumped out.

Q. As a matter of fact, on January 1, 1948, the club was then covered with lima beans and barley, was it not?

A. There were rotten lima beans on the middle road that were never eaten by the ducks.

Q. But you admitted in your testimony that was a violation on Friday?

A. Yes, as far as dumping it during the season, dumping seven sacks out, although they never shot over the grain.

Q. So that if it was a violation and if, as you testified, you did discuss it with Mr. Elder and Mr. Spicer over the phone, and Mr. Elder agreed to let you shoot the last two days of the season, that would not be unreasonable to call that a warning, would it?

A. Mr. Elder wasn't—Spicer is the one I talked with about that grain. He is the one talked about the club had been closed on that morning, and when I got back from San Francisco and I asked why, he said, "You know, those seven sacks of spoiled barley laid by the cook wagon, and I went by there last

(Testimony of Edwin L. Carty.)

night and they were gone, and I asked the Mexican caretaker what happened to them, and he said Jimmy McCormick had told him to dump them out, that there was a lot of ducks there and they would eat it up in a matter of a few hours, and they didn't shoot until the next Sunday.

Q. Referring to that period and that hunting season, isn't it true on the 3rd of January you had a telephone conversation with Mr. Elder in this regard? A. When?

Q. On or about the 3rd of January.

A. Two or three days afterwards.

Q. You phoned Mr. Elder?

A. I don't know whether I phoned him or he phoned me.

Q. Isn't it true at that time you said to Elder that on account of your position as a member of the Game Commission, the other club members were looking to you to straighten out the matter about baiting?

A. No, I didn't say about baiting.

Q. Isn't it true you then said you had been told that a 72-hour period with regard to feeding was all right?

A. I told him that, I raised the question at the November 5th or 6th meeting in San Francisco, I raised the question, can you feed ducks and how long?

That is when Ralph Scott, our attorney, who is from the [450] Attorney-General's office and does all the Fish and Game work, said he would check into it.

(Testimony of Edwin L. Carty.)

So at noon time, after lunch, he came back in and said, "There is nothing in that regulation that forbids you feeding of ducks up to the opening of the season." He said, "within a reasonable time."

I said, "Well, what would be a reasonable time?

And he said, "possibly 72 hours, three days, before."

Q. Didn't you tell Mr. Elder during this phone conversation that County Game Warden Jack White had so informed you?

A. No, no, never. I think Inspector Macklin was at the same meeting with me when that question was raised, and that is where it came back and was passed out there by those who called him up. He quoted the conversation I had and the rest of the commissioners with Ralph Scott, our attorney.

Q. Don't you recall that Mr. Elder during that conversation, after the discussion of the 72-hour business, told you what the exacting wording of the law was?

A. No. He never has and no one else in the Wildlife Service. I have tried to get that clarified for years. They always keep it as though it is a mystery. I have argued with them 10 years.

Q. You mean you have never seen the regulations?

A. I have seen the regulations, but not the interpretation [451] from the Fish and Wildlife. Some of the boys up there quit five days before and in the Valley there, they say 10 days. Really, nobody has

(Testimony of Edwin L. Carty.)

any definite idea of what the regulation is interpreted as.

Q. Do you recall at that time saying that the club had been cleaned up, barley and lima beans, and that you asked them if it was okay to shoot the last two days of the season, because you had important guests coming down? Did you say that?

A. No, I did not. He raised the question. He said I had a priest. That was the morning of the 22nd. He said, "The only reason I let you go back to shoot is because you had a priest coming as a guest."

I have never had a priest as a guest.

Q. Did you tell him the club had been cleaned up of lima beans and barley?

A. No, I did not, because I did not know that. The lima beans, they rotted in the road just there off of the dike.

Q. During that conversation, did not Mr. Elder ask you to put your statement in writing with regard to the 72-hour period, and you stated that you couldn't do so because of your position, but that you would have James McCormick write the letter?

A. No, I did not. There was no reason for my saying [452] that. I explained how I got the information and when and who I got it from.

* * *

Q. (By Mr. Johnson): Did you ever ask James McCormick to write such a letter?

A. No, I did not.

Q. Would the letter from Mr. Elder, Govern-

(Testimony of Edwin L. Carty.)

ment's Exhibt No. 15, concern a subject which you discussed during that telephone conversation?

A. I told Mr. Elder, and I told John Spicer, in other words, that Jimmy McCormick was the manager and the one that had evidently ordered the beans and grain put out.

* * *

Q. (By Mr. Johnson): Would you say in general that this letter concerns a subject which was the topic of conversation between you and Mr. Elder during this particular phone call?

A. That is right.

Q. What would say, then, that you asked Mr. McCormick to reply to this letter?

A. No. I don't remember seeing that letter before. That is the first time I remember of ever reading that letter.

Q. But you did give Mr. Elder the name of Mr. McCormick to contact as the one with regard to the facts of the recent baiting of the Santa Clara River Game Preserve? [454]

A. I might have given him Jimmy McCormick's name.

Q. Incidentally, in your direct testimony, you stated that 166 of the State Game Wardens, in your opinion, were enforcing 90 per cent of the Migratory Bird Laws. You don't mean to be criticizing that, since they are Deputy Federal Wardens, also, do you? A. No, I do not.

Q. As a matter of fact, as a member of the State

(Testimony of Edwin L. Carty.)

Game and Fish Commission, you are glad to see them enforce the law? A. That is right.

Q. You also stated you have been checked more in the last three years than in the previous 40 years?

A. That's right.

Q. Would that be because of the previous violations, which you admitted, at the Santa Clara River Game Preserve?

A. No. I was checked before then. I was talking about John Spicer and Edgerton checking me. That was before this time.

Q. But you approve of that enforcement of the law, don't you?

A. That's right. I tell the boys that if anybody has got over the limit, they have got to be cited.

Q. And if anyone is shooting over a baited area, you approve of their making a citation in that regard? [455]

A. Within reason. If it is not a technical violation.

Q. What is a technical violation, in your opinion?

A. I believe a technical violation is if there is a few grains left on a club after the legal feeding up to the day before. But Elder made that statement himself; legally you can feed up to the day before, on our first meeting after this day.

Q. Do you remember the conversation you referred to in your direct examination between you and Mr. Ernest Bedwell at the time you came off the premises of the club on October 2nd?

A. That's right.

(Testimony of Edwin L. Carty.)

Q. Do you recall saying to Mr. Bedwell that it was a technical violation, and his answer, "Ed, do you infer this is a technical violation?"

A. On the 22nd?

Q. Yes.

A. He never said a word about it being a violation or anything. I said about the beans, that the beans looked bad there and they ought to be covered over. Now, why——

Q. I am referring to——

Mr. Irwin: Just a minute. Let him finish.

Mr. Johnson: He is talking about Jack Bedwell.

The Witness: That's right. I am talking about the 21st. [456]

Q. (By Mr. Irwin): I am talking about the 22nd, Mr. Carty.

A. When we came up to the fence there and handed over our ducks and our guns and coats and things, decoys, over the fence, I said, "You honor me with having the whole patrol here." There were three wardens there and two others, five wardens, checking me. There wasn't very much said when I walked over to them at all, as far as I am concerned. I don't remember saying anything to him about a technical violation.

Q. Isn't it true that you did——

A. I did talk to Edgerton. He is the one.

Q. Isn't it true you said to Mr. Ernest Bedwell on that occasion, "Ernie, if you wanted to be technical, you could pick up all the clubs in the area

(Testimony of Edwin L. Carty.)

for baiting," and Ernie replied, "Ed, are you inferring this is a technical violation?"

A. No, I don't remember saying that.

Q. You don't remember saying that?

A. No.

Q. But you think a technical violation is okay, right?

A. Well, that is a matter of opinion. I think——

Q. But that is your opinion? [457]

* * *

The Witness: A reasonable amount. If there are two or three buckets of grain over 40 acres of land where the ducks and mudhens could find them, I wouldn't call it——

Q. (By Mr. Johnson): Handing you Government's Exhibits 5, 6, 7, 8, and also 2, 3, and 9—excuse me for jumping around so much with regard to the numbers—now, looking over those pictures—we will take No. 4, also—there has been testimony, as you realize, to the effect that lima beans are feed. Assuming that lima beans are feed——

A. I won't agree to that. [458]

* * *

Q. Referring to Government's Exhibit No. 2, I think that is the one, or perhaps it is Government's Exhibit No. 4, I think that is the one which you stated you didn't think counsel for the government could identify as grain. Do you remember which one it was, whether it was 4 or 2?

A. I was questioning the location of the dike—this is the one I had, on dike 4.

(Testimony of Edwin L. Carty.)

The Witness: This is the picture, No. 4, that it was stated that this grain, if it is grain, was on dike 4. I contend that couldn't be on dike 4, because there wasn't that [460] type of ground on dike 4.

Q. (By Mr. Johnson): I appreciate that but that is not quite responsive. In other words, you stated in one of these scenes you didn't think anybody could identify what was said to be grain, and which the picture purports to depict, you said you didn't think anyone could identify this grain. Is this the one?

A. This is the only picture that was brought up.

Q. All right. Referring to Government's Exhibit No. 2, then, would you say that can be identified as grain or not? A. That could be pods.

Q. Do you see any pods there?

Mr. Irwin: Just a minute. Let him finish his answer.

The Witness: Yes, all this stuff in here.

Q. (By Mr. Johnson): The white stuff is pods?

A. That's right. In other words, I could throw a lot of radish pods and trash out there, and it wouldn't look any different than that.

Q. In your opinion, that is trash and radish pods, not grain?

A. And this is supposed to be at dike 4.

Q. But in your opinion, is this trash and radish pods, not grain? A. It could be. [461]

Q. Could you give me a yes or no answer, please?

A. In my opinion, I wouldn't know, unless I actually saw it.

(Testimony of Edwin L. Carty.)

Q. Looking at the picture?

A. I think it is radish pods and trash.

Q. You don't think there is any grain there?

A. I don't know, but I know that isn't at the end of dike 4, because there is no water in this pond here.

Q. You say you have been a rancher a long time, Mr. Carty?

A. Well, my boyhood has been spent on the farm and my education has been ranching.

Q. You raised cattle?

A. I raised some cattle.

Q. Was that in Ventura County?

A. That's right.

* * *

Q. Did you ever or would you feed cattle whole lima [462] beans like that?

A. No, not as a regular diet.

Q. Pardon?

A. Not as a regular diet. They will eat a little beans and hogfeed. What we feed them, though——

Q. But you were talking about cattle. You stated, I think, that these lima beans had been put out on the premises of the club for the purpose of feeding cattle? A. I did not say that.

Q. I thought you said that. But you wouldn't feed these to cattle?

A. Not as a regular diet. The cattle would eat some of them, but they are certainly not cattle feed, any more than duck feed.

(Testimony of Edwin L. Carty.)

Q. In your experience as a rancher, would cattle eat them from the bare ground?

A. They will lip them up.

Q. That is lima beans, whole, such as I just showed you? A. That is right.

Q. When were the lima beans put out?

A. They tell me about the 8th.

Q. About the 8th?

A. About 8th of October, about two weeks before the season opened. [463]

Q. Do you know why they were put out?

A. I don't know. I think they had the idea that possibly the mudhens might eat them. They had some there in the yard, and they still had some, to keep them out of the peppers.

Q. You realize mudhens are migratory waterfowl?

A. That's right, but they didn't eat them, or they wouldn't have left them.

Q. How many lima beans were put out?

A. 36 sacks, 100-pound sacks, with dirt and trash in them, and the culls.

Q. Would that have been on October 13th at 10:00 a.m. that those were put out? A. No.

Q. Did you ever tell anyone it was October 13th at 10:00 a.m.? A. Not the beans, no.

Q. Pardon?

A. Not the beans. The grain, the last of the grain was put out about then, I was told.

(Testimony of Edwin L. Carty.)

Q. When were the lima beans put out, if you can recall the exact date?

A. I believe around the 8th of October.

Q. Around the 8th of October?

A. Yes, and they would have been put up at the center of the road if they thought they were going to be duck feed. [464] They were out on the southwest corner.

Q. Again, who put them out?

A. The workmen there on the ranch. Jimmy McCormick was acting as foreman. He farms that land.

Q. You don't like Mr. Spicer very well, do you?

A. I like Mr. Spicer and have always treated him like a gentleman. I have never put my nose into the feud that has been going on for years there between him and Jack White.

Q. And what about Mr. Edgerton?

A. Yes. He is a gentleman and was the only one that was that morning.

Q. Do you like Mr. White, Jack White?

A. Yes. Jack White is an oldtimer and very active in rod and gun clubs, and keeps very fine public relations. [465]

* * *

Q. As a matter of fact, Mr. Carty, you supported Jack White rather strongly in his bid to keep the County Game Warden job, did you not?

A. No, I did not.

Q. Did you ever discuss County Game Warden White's record with Mr. Macklin?

(Testimony of Edwin L. Carty.)

A. Can I explain the last answer?

Q. Surely. Go ahead.

A. I have always felt it is none of the State's business if a county wants to expend its money for a county warden, that is their business, and I have kept my nose out of that feud.

Q. Mr. White has shot a lot on your club, hasn't he?

A. Yes, he has shot several times a season. He has been invited, like all the rest of the wardens have been.

* * *

Q. (By Mr. Johnson): As a matter of fact, since October 22, you have expressed your opinion that there are too many State Game Wardens in Ventura County, haven't you? [467]

A. Since the——

Q. Since October 22?

A. Compared with the other counties in the State. We have four State and one County warden in our county, and we have got counties like Colusa with millions of ducks and pheasants, and they have got only one warden, some two, some none. There is a poor distribution of wardens in the State.

Q. Did you have Mr. Spicer in mind when you made those remarks?

A. No, because what I had in mind was the fact that here are four or five wardens watching this one little 40-acre club practically every day, sitting there in the afternoon at 3:55, to see that we stop feeding, two carloads sitting right there, practically in the

(Testimony of Edwin L. Carty.)

club, on a private road there, and when they have got that much time, and the other counties need wardens so badly, that is where they should be distributed.

Q. You told Mr. Macklin that since October 22nd? A. That's right.

Q. In other words, that was the climax, as far as your are concerned?

A. I realized why they had four wardens at $8,800 apiece in our county, when we only sell $3,500 worth of licenses.

Q. I think you stated in your direct examination that [468] in your opinion ducks will not eat lima beans? A. That is right.

A. That's right.

Q. Do you know how close a duck has to be to a lima beans before he can recognize it as a lima bean and decide he does not want it?

A. They will pick grain out of lima beans.

Q. And they will pick at a lima bean like a chicken and, if it is a lima bean, they will drop it, is that correct?

A. The only kind of bean I have ever seen in a duck is a black-eyed bean, and I have cleaned plenty of them.

Q. But you do admit they pick at their food and, if they don't like it, they spit it out?

A. Well, I have watched ducks and chickens pick where you got weevil grain, and they will pick the solid grain and you wonder why they don't pick the other. It was weevil grain.

Q. You know, as a matter of fact, Mr. Carty,

(Testimony of Edwin L. Carty.)

most of the clubs up in that area feed lima beans as a common practice? A. No, they don't.

Q. Are you against the baiting regulations?

A. I am against it as far as the clarification is. They should clarify it so there isn't all this mystery and the clubs know what they can do and what they can't do. [469]

Q. As a matter of fact, you have spoken against the baiting regulation, haven't you, heretofore?

A. I think the clubs should be advised what is too much duck feed, then, so they can take care of it.

Q. In other words, you are against the philosophy of the baiting regulation?

A. I don't believe in shooting birds over baited ponds like is done in the Middle West, where they trench shoot them, put out corn and popshoot the ducks.

Q. Was your answer yes or no? You have explained it now. A. As practiced now.

Q. But you do recognize that it is the law at the present time?

A. That's right, it is a regulation. [470]

* * *

Redirect Examination

By Mr. Irwin:

* * *

Q. I show you Government's Exhibit 2 for identification, Mr. Carty. There has been some evidence offered by government witnesses that that picture

(Testimony of Edwin L. Carty.)

represents the intersection [471] of dike 4 and the south ridge road. Do you recall what the conditions were at the intersection of dike 4 and south ridge road on the 22nd day of October, 1949?

* * *

The Witness: Yes. [472]

Q. (By Mr. Irwin): What were they?

A. This pond here was full of water right down to here on both sides. In this picture, you can see both of these ponds filled up with water right down to the corner and when I came back and crossed it, if there had been material like that there, I would have seen it. That couldn't have been taken on the 22nd, because you will notice in this picture that this pond is all dry. There is no water. The aerial picture shows there is water.

Those are two of the best ponds in the club, and they fill up right down to the south road. When you look at the picture, that is all dry weeds out there. That could have been two or three days before, but it was not that way on the 22nd, or that would show water in this corner.

Q. Government counsel asked you in some detail about mudhens and whether or not they were migratory fowl. In that connection, may I ask you, Mr. Carty, first of all, there were no mudhens shot on either the 21st or the 22nd of October, were there?

A. Not that I know of.

Q. Will you please tell us what is the situation with reference to mudhens as being a target for sportsmen?

(Testimony of Edwin L. Carty.)

A. They are considered a pest on all sportsmen's clubs, because they clean up all the feed that you would want for ducks and as far as food value, I wouldn't eat them, and [473] I don't know many people that do eat them or shoot them for food. They have changed the name and put a bag limit on them to try to get them to hunt mudhens.

Recross-Examination

By Mr. Johnson:

Q. Just one other thing. You referred to what I think is Defendants' Exhibit A and say that has water in it at the cross dike No. 4.

A. Right here on the diagram.

Q. Of course, you don't mean for the jury to believe that that picture was taken at or about October 22nd, do you?

A. I am saying on that day both of these ponds were full right up to the corner here.

Q. Answer my question, please.

A. No, that was not taken the same day.

Q. When was it taken?

A. I don't know the exact date that that was taken, but shortly after the 22nd.

Q. It has been taken within the last two months, has it not?

A. It was still while the season was on, because we drain the water out after the season is over.

* * *

LAWRENCE NUNES

called as a witness on behalf of the defendants, being first duly sworn, was examined and testified as follows:

* * *

Direct Examination

By Mr. Irwin:

Q. State your full name for the benefit of the ladies and gentlemen of the jury, please.

A. Lawrence Nunes.

Q. Are you superintendent of acreage in Ventura County, of some large acreage in Ventura County? A. Yes, sir.

Q. For whom do you work?

A. Gentry, Inc.

Q. I show you what has been identified as Defendants' Exhibit A and ask you if you see any of the Gentry lands on that exhibit.

A. This thing is kind of turned around here for me. Let's see here.

Q. Perhaps, rather than to——

A. Oh, this right in here. We farm this and also this field right in here, 250 acres.

Mr. Irwin: May the record show the witness has identified a spot on the uppermost part of Defendants' Exhibit A, westerly part, and the northerly spot. Is that a fair statement, [475] Mr. Johnson?

Q. In connection with your duties, Mr. Nunes, there is a hunting club, also, on part of that Gentry land, is there not?

A. Yes, sir. I built a small one there myself.

(Testimony of Lawrence Nunes.)

Q. Referring to the fall of 1949, did you have occasion to put out any lima beans?

A. We did. We put out about 17 bags.

Q. Did you observe whether or not the ducks ate those beans? A. No, they did not.

Q. When did you put the beans out?

A. Well, I should say somewhere around the 10th, between the 10th and the 15th of September.

Q. How long did those lima beans remain without the ducks touching them?

A. Well, they laid there on the ground until after the season opened on October 21. We have got a small group, which includes about 10, that shoot at the club and all I had to do with it, I built it and filled the pond with water, and I left it up to Mr. Joe Farrar to handle the rest, and he checked with some warden, I don't know which one it was, and he said we could feed up to 72 hours before the season opened.

Q. What I meant was the lima beans. You put them out between the 10th and 15th of September and they remained there, [476] you know that, and you saw them still on the ground?

A. Yes, sir.

Cross-Examination

By Mr. Johnson:

Q. I am not sure, Mr. Nunes, where these lima beans were put out. I am sorry, but I didn't get that.

(Testimony of Lawrence Nunes.)

A. Right around our pond. It was around this small club. You can't see that, hardly, on this map, but it is right around these dikes where we put out our beans, and right in here is another pond where we also have got a small levee, and we scattered them. I did not myself, but somebody did.

Q. What was your purpose in putting the lima beans out? A. For duck feed, I guess.

Q. You were trying to attract ducks with them?

A. Trying to, but it didn't work.

Q. How many other seasons had you done that?

A. We had never done that before.

Q. Are you a hunter yourself?

A. When I get a chance.

Q. How long have you been hunting?

A. Since I have been about nine years old, big enough to carry a .22 rifle. [477]

* * *

LEO MULDOON

called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

* * *

Direct Examination

By Mr. Irwin:

Q. Mr. Muldoon, where do you reside, sir?

A. I am the keeper of the Point Magu Game Preserve, Inc.

Q. You live in Ventura County?

A. Yes, sir.

(Testimony of Leo Muldoon.)

Q. How long have you been the keeper of Point Magu? A. Oh, about five years.

Q. Have you had experience in observing the eating habits of ducks? A. I have.

Q. Have you had occasion to observe whether or not [478] ducks will eat lima beans?

A. No, they won't.

Q. You have observed that of your own knowledge? A. Yes, sir.

Q. In what way have you observed that, Mr. Muldoon?

A. Well, every year some of the boys that belong to the club will bring down a few beans, hoping they will eat them, and they just won't eat them.

Q. Have you, in connection with your duties as the manager of Point Magu Game Preserve, had occasion to observe flights of ducks and to observe how much grain they would consume over a period of a couple of hours? A. Yes, sir.

Q. Have you ever made an experiment and actually calculated the number of ducks present?

A. Yes, sir, I have.

Q. What experiment did you conduct, Mr. Muldoon?

A. Well, we took nine sacks of grain, I imagine it was. I imagine there was, oh, 10 or 12 thousand ducks, I would say, and I took the nine sacks of grain out there and in 22 minutes it was gone. They ate it.

Q. How long?

A. Between 20 and 25 minutes.

(Testimony of Leo Muldoon.)

Q. When did you make that experiment, Mr. Muldoon? A. This last year. [479]

Q. This last——

A. In the season, the first part of the season.

Q. Mr. Muldoon, just so we won't mislead anyone, you are related by marriage to Mr. Maxwell, one of the defendant in this case? A. Yes.

Q. That, of course, in no way affects your testimony and you are telling the truth on the stand?

A. Yes, sir.

* * *

Cross-Examination

By Mr. Johnson:

Q. Have you got the figures on this experiment you conducted? A. No, but I got a witness.

Q. Did you keep figures?

A. No, I don't keep figures.

Q. How many birds were there?

A. I would say between 10 and 12, 13 thousand.

Q. You haven't got the figures on the thing?

A. No, sir.

Redirect Examination

By Mr. Irwin:

Q. You say you had a witness. Who was that?

A. My wife. She held the watch.

Q. What is that?

A. My wife held the watch.

* * *

JAMES McCORMICK

called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

* * *

Direct Examination

By Mr. Irwin:

Q. Mr. McCormick, where do you reside, please, sir? A. At Oxnard, California.

Q. How long have you lived there?

A. On this one ranch about 22 years. I was born near there.

Q. You are a member of the Santa Clara River Game Preserve, this family club that has been testified to here, are you not? A. Yes. [481]

Q. You were in charge of the grain that was distributed on the club in 1949? A. Yes.

Q. First of all, how much grain was purchased, Mr. McCormick?

A. I had three sacks in the barn from last year, and I purchased from Mr. Papek 80 sacks more of barley.

Q. How many pounds were there to the sack?

A. They averaged about 90 pounds to the sack.

Q. I show you defendants' Exhibit I in evidence and ask you to examine it and tell us, if you can, what that fairly represents.

A. That is a good sample of the 80 sacks that I bought from Mr. Papek.

Q. Where was that sample obtained?

A. It was obtained from one of the sacks. I

(Testimony of James McCormick.)

just dipped my hand in and filled up that box to that height.

Q. In other words, this sample, Defendants' Exhibit I, was prepared by you and taken from one of the remaining sacks of grain that you purchased prior to the opening of the season in 1949, is that true? A. Yes.

Q. Having purchased that 80 sacks on behalf of the club and having three left over, will you state how much grain you caused to be distributed on the grounds of the Santa Clara [482] Game Preserve prior to the opening of the 1949 season.

A. The three sacks I had in the barn and 38 that were from the new purchase.

Q. In other words, a total of 41 sacks?

A. 41 sacks altogether.

Q. Who distributed this grain, please, Mr. McCormick? Did you have an assistant, in other words?

A. I had a man bring it down from the warehouse, and he helped me load the broadcaster and he helped me with it.

Q. Where did you load it, looking at Defendants' Exhibit A?

A. We came down in through here.

Q. What is the dike?

A. That is the south road, and I had this little broadcaster that I had hooked on a Ford Tractor. It hooked right behind and held about five or six sacks. We would take about five or six sacks and put that in from the truck.

(Testimony of James McCormick.)

Q. Then how did you go about distributing it?

A. Oh, I would go around the south road. This broadcaster had two circular spinners underneath the container that held the grain, and they would throw the grain out, oh, six to eight—it is according to the speed you go. At the slow speed I went, it threw it out five to six feet, probably, five to seven, on each side. [483]

But when I would go along the south road, I would shut off the side that was away from the water and drive slowly along, and it would cover the road and throw it out into the water maybe a foot or two, and then when I would get down to this No. 1 dike from the east road, this is the one I took, I would go down here and turn up there and go around here, and I would continue that operation until we had used the grain up.

Mr. Irwin: May the record show that his finger traveled down south road to dike 5, and across the center dike, and then up, your Honor.

The Court: Yes.

The Witness: I usually go this direction, but once or twice I reversed it and went the other way, which is the same.

Q. (By Mr. Irwin): I understand that.

A. One time I went by the road, I was watching the broadcaster, so instead of turning around, I continued over to this side and turned around on this one here, the north one, but just a small amount. I went down and back.

(Testimony of James McCormick.)

Q. Do you know whether or not those lima beans that have been testified about here were already out on the property at the time you distributed the grain? A. Yes, they were.

Q. By the way, do you and your brother also farm this land in the off season, which is part of the Santa Clara Game [484] Preserve?

A. Yes, we run cattle on that.

Q. Were you running cattle in there prior to the season?

A. Yes, we put 125 or better cattle in there, I think, late in June, and they were there until just a few days before the season opened.

Q. Did you, from your own observation, observe whether or not the cattle were consuming any of these lima beans that were there on the premises?

A. Yes. Several times I noticed the cattle feeding—well, you couldn't call it exactly feeding. Those beans were spread real thin out of the tailgate of a truck, just real thin, about five feet wide, and these cattle would, oh, more or less, you couldn't call it—they would kind of lip them up. They would spread their mouths and draw them together and pick up a few beans that way. There was so much dirt in them that I guess they didn't enjoy the dirt.

On one occasion that really sticks in my mind, I came out and there were 10 or 12, probably more, cattle, some eating them, others lying down, and others standing, and we had a bull there, and I noticed that his lips would really open up and pull

(Testimony of James McCormick.)

across, and I got a little closer, and he threatened to chase me, so I didn't bother any more.

Q. That is what sticks out in your memory?

A. Yes, that sticks out in my memory.

Q. And you left? A. And I left.

Q. This was, of course, prior to the opening of the season? A. Yes.

Q. And the cattle were removed before the season opened? A. Yes.

Q. You said those beans were there prior to your having distributed the grain. When was the grain distributed?

A. Well, Mr. Maxwell called me and told me about the time to get the grain out. He had talked to the warden and the warden was of the opinion we should get it out about 10 days before. So I had talked to Mr. Papek about buying this barley, and he told me it had weevil in it——

* * *

Q. (By Mr. Irwin): All right. What was the condition of this grain that you purchased?

A. This grain, well, at the time I thought it would be a good buy but, as it turned out, it was, oh, I would say 20 to 25 per cent radish seed and chaff and other foreign matter, and some of the grain was light where undoubtedly the [486] weevil had drilled in and taken the flour out of the grain.

Q. You observed all this at the time you were opening up the bags and distributing the grain?

A. Yes. We put the grain out as soon as we

(Testimony of James McCormick.)

could. It was harvest time and I was busy, but I got the little tractor and broadcaster out there, and I had trouble, so I did not have the rest of the grain brought down until the next day. I put out those three sacks, and I was going to put it all out nine days before, but we were pressed for time and I couldn't get to it in time.

Q. So the last grain of this 41 sacks was put out about eight days before the season opened?

A. Yes, the 12th, in the afternoon, and the 13th, the morning of the 13th.

Q. It was the afternoon of the 12th and the morning of the 13th? A. Yes.

Q. Now, after this grain was put out, a few days thereafter, did you have occasion to have a conversation with State Game Warden Getman?

A. Yes.

Q. Where was that conversation had?

A. I had come to the club to see if any more ducks had come in that Friday morning, and we had just a few hundred. I spread this grain with the broadcaster. Always before, we [487] would spread it out from sacks, but we put out such a small amount, that I had an idea the broadcaster would kind of hold up the clean-up. If we would put it out ordinarily, two or three thousand ducks would have cleaned it up in a short time. So when I noticed the ducks hadn't increased any by Friday morning, I went to Ojai and I talked to Mr. Carlos Getman, and I told Carlos that we had put this feed out and I had broadcast, and I was a little

(Testimony of James McCormick.)

concerned that the ducks weren't coming in, if we didn't get more pretty soon, they wouldn't be able to clean it up.

He said that he would check it and let me know.

Q. This was, you say, on the 14th?

A. Yes, Friday.

Q. In other words, a week before the season opened?

A. A week before the season started.

Q. You know County Game Warden Jack White, do you not? A. Yes.

Q. Thereafter, did you have occasion to go over the Santa Clara Game Preserve prior to the opening of the season with Mr. White?

A. Yes. I met Mr. White at Oxnard and we went out and checked the club on Tuesday, I think that was the 18th of October, and we went over the club pretty thoroughly, and after the inspection, Mr. White told me that—he said, "Jim, [488] you needn't worry," he says, "the ducks will have it cleaned up. You now have two or three thousand ducks here and I am sure it will be all right."

Q. By the way, coming down now to October 21st, which was the day the season opened, directing your attention again to Defendant's Exhibit A, which is there before you, did you observe on what part of the preserve the ducks were concentrated on the morning of October 21?

A. The ducks—the water we pumped in would come in right about here, and we had a valve in each side of the middle road dike, and it would go out

(Testimony of James McCormick.)

there, and most of the ducks would congregate on these two middle dikes here where the water was fairly fresh.

Mr. Irwin: May the record show that the witness pointed to the eastern edge of Defendants' Exhibit A, the eastern line of the property?

Q. Now, then, first of all, you did shoot on the 21st of October, that is, the day before?

A. Yes.

Q. Will you just tell us what you did, where you went on the 21st of October on the game preserve there?

A. I went out and shot in blinds 11 and 12. That would be at dike 4. That was the first day.

Q. By the way, the shooting season opened at noon on October 21st? [489]

A. At noon on October 21st the season opened.

Q. After you came in, did you have occasion to see Warden Jack Bedwell that day? A. Yes.

Q. Did you have a conversation with him?

A. Yes, I did.

Q. Was there anyone else present?

A. Well, when I went in there were two other people present, a guest and Mr. Vincent Doud.

Q. And what conversation did you have with Mr. Jack Bedwell at that time?

A. Mr. Bedwell and I went out to the wagons, and I brought up the bean question. I told him that we had put the lima beans out here and that they looked bad, probably, and that we could cover

(Testimony of James McCormick.)

them up, we had a big carry-all and tractor out in the field. I said, "What do you thing about it?"

He said, "I think that would be a good idea."

Q. Did he make any other comment to you?

A. No, he didn't offer to go out to look at the beans, so we went back.

Q. Could you both see the beans from where you were standing at the time you had the conversation with him?

A. We were within, I would say, 60 to 70 yards from the beans, and they could be easily seen. [490]

Q. You did see them while you were talking to him? A. Yes.

Q. Did you point to them?

A. I motioned towards them.

Q. By the way, going back a little bit to the time that you told us of the conversation with Mr. Getman, you didn't hear from Mr. Getman again, did you? A. No, I didn't.

Q. Having in mind later on the 18th, you stated Mr. White went out with you and went over it, were you later on the grounds of the game preserve and before the season opened, and did you observe any State Game Wardens about these premises? This is before the season opened.

A. When I was out with Mr. White, I noticed two of the dikes needed a little dirt shoveled to hold them better, and I saw Mr. Vincent Doud and we went out either that afternoon or the next day, I can't be positive, it was either that afternoon or the next day, and that would be Tuesday afternoon

(Testimony of James McCormick.)

or Wednesday, and we drove up on the east road and came to a stop at the middle dike, and we started to get out of our car, when we noticed a Fish and Game car driving slowly along the north road just above the club.

When we got out and opened up the back of the car, he stopped just about here and observed us, I guess. I couldn't say, you know. [491]

We took the shovels out and went through the fence and started down the middle road dike and, as we did that, he started up and came towards us in his car slowly, and I turned around and tried to wave him down with a halting gesture, I guess you would call it, and he waved and speeded up his car and kept going.

So I thought that he was probably the game warden that came out to check the club and he didn't stop and everything was all right.

Q. On this afternoon of the 21st, when you talked to Mr. Bedwell, he said nothing further than that he thought it would be a good idea, when you volunteered that perhaps the lima beans should be covered over, because they looked bad?

A. Yes. Those were his words.

Q. Did you observe whether or not the ducks were eating any of those lima beans that were out there? A. No, they were not.

Q. Now, did you have a conversation with Mr. Maxwell after he returned from Los Angeles on the 19th or 20th of October regarding his talk with Mr. Macklin?

(Testimony of James McCormick.)

A. Yes. He told me before he was going to see Mr. Macklin, and I called to see what he had found out, called him on the telephone.

Q. In the interest of time, you heard Mr. Maxwell's testimony as to the conversation he said he had with Mr. [492] Macklin? A. Yes.

Q. Did he tell you substantially what he stated here on the stand?

A. He said if the barley was substantially cleaned up, it was all right to go ahead and shoot, so I notified Mr. Jim Doud, our president, and we just told the members to go ahead and shoot, everything was all right.

Q. For the opening of the season? A. Yes.

Q. I don't think I covered this. There was no question but what you shot your birds there on the 21st and likewise on the 22nd? A. Yes.

Q. I wish to show you Government's Exhibit No. 2 in evidence, and I understand that the gentleman who took the pictures stated this was taken on the 22nd of October, 1949. Looking at that picture, can you tell us where on the Santa Clara Game Preserve that picture was taken with reference to the dikes, if you can or, if you can't, say so.

A. Well, those corners all look more or less alike, although the upper two have—I would say that was on the—that would be on the south road, probably, and up near the southwest end.

Q. Specifically, do you recall whether or not between [493] dikes 4 and 5 there was a good deal of water in there?

(Testimony of James McCormick.)

A. Yes. At the opening of the season, the first two or three days, those ponds were all full.

Q. I call your attention to the fact that in this picture here the pond appears to be nearly dry.

A. Yes. I can see just a small amount of water.

Q. So that the physical characteristics of Exhibit 2, as far as water is concerned, do not correspond with conditions as they existed at dikes 4 and 5, as they existed on the 22nd day of October, 1949? A. No, they do not.

* * *

Cross-Examination

By Mr. Johnson:

Q. When, again, were the lima beans put out?

A. I didn't actually put out the lima beans, but they were put out on October 8th.

Q. Who put them out?

A. Mr. Eugene Doud had them put out.

Q. What was his reason for putting them out?

A. Well, we had talked about them, and we thought maybe that if we put the beans in that southwest corner, a small amount, it might keep the mudhens over there. We get them for nothing, and we just hoped they would keep the mudhens out from the peppers. [494]

Q. They weren't put out for cattle, then?

A. No, they were not.

Q. Had you ever previously put lima beans out?

A. We had put them out at another time and the ducks would not eat them?

(Testimony of James McCormick.)

Q. Why did you want to put them out this time then?

A. Well, Mr. Doud had them and he brought them down and we had several—20 other sacks, at least, I guess, in the barn, and I did not bother to have them put out because I did not think it was worth while. The ducks wouldn't eat them.

Q. In other words, those that were put out were put out on the chance that they might eat them?

A. And also to keep the mudhens away. My brother and I farm all that land and on the other side there, that was subleased to the Gentry Corporation with the understanding we would keep all mudhens out of the pimientos, because the mudhens drill a hole in them and eat the seed out, and they are very destructive.

So we told them if we had to, we would hire a rider and have him ride back and forth and keep them out, and that is why we put them, all the feed, on the south of the club. We didn't put any whatever on the north, because that would put them closer to the pimientos.

Q. How many sacks were put out of beans? [495]

A. 36, I believe.

Q. How much do those sacks weigh?

A. They were not fully filled. Sometimes they sew them and other times they will draw them up and tie a knot. I would say they averaged 100 pounds of dirt and beans.

Q. How many were put out there previous to the season?

(Testimony of James McCormick.)

A. I don't recall. I didn't put them out.

Q. But there were some put out?

A. The previous season, yes, we tried some.

Q. That would be the latter part of December, 1948?

A. No, it was before the opening of the season.

Q. But they were there during the latter part of December, 1948, were they not?

A. Yes, and the ducks would not eat them, and they smelled so bad, you could hardly get in your blind near them.

Q. But you did go ahead and try it again in October, 1949?

A. Just in that one corner away from where the ducks would eat them. If the ducks ate them, they would be at the center road.

Q. You put them on a corner, you say?

A. We put them on the southwest corner over here on the south road.

Q. You ran them along the south road, didn't you? [496] A. Yes.

Q. Like it shows in the picture?

A. For about 75 or 80 yards.

Q. What kind of grain did you put out the season previous? A. We put out barley.

Q. Was it the same type of barley you put out this last year?

A. A much better quality. My brother and I grew that barley.

Q. You stated when you talked to Jack Bedwell,

(Testimony of James McCormick.)

you remarked to him that the lima beans looked bad there. What did you mean by that?

A. Well, they were kind of futile, I guess. We put them out to attract the mudhens, and the only thing that ate them were the cattle.

Q. Why did it look bad to you? In your opinion, would it be bad to put out things for mudhens? Is that what you mean?

A. We didn't shoot the mudhens.

Q. Why would it look bad to you to put out lima beans?

A. Oh, to have any kind of food along the dike would look bad, I imagine, to the general public.

Q. In other words, lima beans might be duck food, [497] that is what you thought?

A. No. I had experience that they were not duck food.

Q. Then why did you feel it looked bad?

A. The mudhens wouldn't eat them, and I wanted to cooperate as best I could.

Q. What was there to cooperate with, if there was nothing wrong in putting them out?

A. I guess there was nothing wrong with them.

* * *

Q. (By Mr. Johnson): Why did it look bad?

A. I really never thought why they looked bad, but if it would help any in the eyes of the Fish and Game, I told them—I didn't say this but I felt I could cover them up for him.

Q. Isn't it a fact you realized possibly they

(Testimony of James McCormick.)

were duck food and you were indulging in a possible violation by having them out there and that is the reason you said they looked bad?

A. No. [498]

* * *

Q. (By Mr. Johnson): Why didn't you cover them up in [499] accordance with your suggestion, since you do say, of course, Mr. Bedwell agreed it was a good suggestion?

A. I motioned toward the tractor and carry-all, which was out in the field about a quarter of a mile, and it was standing still. Being harvest season, the man that handled that was working, and it was Tuesday morning before we had a chance to do it, and Tuesday morning they were covered up.

Q. But you did go out and hunt on the 22nd after suggesting they ought to be covered up, because they looked bad, presumably because the public might not think it was right?

A. Yes, but we never had time to cover them up, and he didn't offer to go out and look at them, so I thought he considered they didn't mean anything.

Q. You do say that he agreed they looked bad, don't you, and agreed you ought to cover them up?

A. He didn't agree that they looked bad.

Q. You said that in your direct examination.

A. He said it would be a good idea.

Q. He said it would be a good idea, and therefore he agreed with you they looked bad. What time did you leave the premises on the 21st of

(Testimony of James McCormick.)

October after you had suggested they be covered up?

A. Oh, I imagine shortly after 2:00 o'clock.

Q. What did you do the rest of the day? Couldn't you have covered them up at that time?

A. I have a walnut orchard and we were in the middle of harvest season, and I hurried up there. I really shouldn't have been hunting.

Q. If you felt they looked bad and they should be covered up, why did you go ahead and hunt the next day?

A. Because he did not tell me to cover them up.

Q. He said it was a good idea.

A. Yes, but just as a suggestion, I guess.

Q. But you didn't follow the suggestion. It was your suggestion, however, wasn't it?

A. Yes.

Q. And you didn't follow your own suggestion?

A. I told him we would cover them up as soon as we could get to them.

Q. And you couldn't get to them before you went hunting next? A. The next morning?

Q. Yes.

A. No, I could not. That man was busy on the threshing machine. [501]

* * *

J. L. STEVENSON

called as a witness by and on behalf of the defendants, having first been duly sworn, was examined and testified as follows:

* * *

Direct Examination

By Mr. Irwin:

Q. Mr. Stevenson, you know Mr. Carty who testified here in this case? A. Yes, I do.

Q. As a matter of fact, were you a guest on the 22nd day of October, 1949, at the Santa Clara Gun Club? A. Yes. [502]

* * *

Q. So, of course, you couldn't observe the conditions on the ground before daylight, since it was dark? A. That is right.

Q. But after you had finished shooting, which way did you come off the pond?

A. Let's see. I am a little confused here. But I came—we were over here. We came around over to here.

Mr. Irwin: The witness has, with his finger, shown he was in a position approximately in the center, between the center dike and the south river road on dike 4. He has traced a line showing he walked north to the center dike and then easterly to the east river road.

Mr. Johnson: East river road?

Mr. Irwin: Down here.

Q. Of course, it was daylight when you came away from the blinds? A. That's right.

(Testimony of J. L. Stevenson.)

Q. Did you have occasion to or did you see any grain as you were walking across there and down the center dike?

A. There was no grain here. We were hunting here. There was some little—I don't know if it was beans, straw, or mustard, or something like that around, but I seen no barley whatever. [503]

Mr. Irwin: May the record again show the witness pointed with his finger to an approximate point mid-distant between the south river road and center dike on dike 4, and his finger traveled north on the center dike and then easterly on the center dike to the easterly extremity of the premises? [504]

* * *

JOE PAUL, JR.

called as a witness on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

* * *

Direct Examination

By Mr. Irwin:

Q. Will you please state your full name?

A. Joe Paul, Jr.

Q. What is your business or occupation, Mr. Paul?

A. I am county editor of the Star Free Pess in Ventura.

Q. Were you so engaged in October, 1949.

A. Yes.

Q. Did you have a telephone conversation with

(Testimony of Joe Paul, Jr.)

Agent Elder of the Federal Fish and Game Service on or about the 24th day of October, 1949?

A. I did. [507]

Mr. Irwin: May I have this marked for identification?

The Clerk: What purports to be a newspaper article will be marked Defendants' Exhibit N for identification.

(The article referred to was marked Defendants' Exhibit N for identification.)

Mr. Irwin. Did you make certain notations at the time you were talking to him, which you later caused to be printed in your newspaper?

A. Yes, I took notes.

Q. And just before taking the stand, you refreshed your recollection on that phone conversation by referring to Defendants' Exhibit N for identification? A. I did.

Q. As a result of that, can you tell us, if you will, what the conversation was between Mr. Elder and yourself on the 24th day of October, 1949?

A. Well, I had called him previously when I had first heard of this duck hunting case. On this particular date, I had called him to ascertain what they planned to do as a result of various information that he had gathered that day. I discussed with him the laws and the violations, and also the setup that had led to his gathering information there in Oxnard.

Q. What did he say about the information that had led to their going to Oxnard. [508]

(Testimony of Joe Paul, Jr.)

A. Well, he said that this particular duck club, the Santa Clara Game Preserve, had been more or less under observation for some time. He didn't indicate to me under whose observation it had been, but they had been watching the club.

Q. Was there any reference to the opening date of the season, as to whether they had been watching it?

A. Well, he said he had been there the day after the opening of the season, but that he had received information that there was grain on the ponds several days before the season had opened.

* * *

JACK WHITE

called as a witness on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

* * *

Direct Examination

By Mr. Irwin:

Q. Where do you reside, Mr. White.

A. At Ventura.

Q. How long have you resided there? [509]

A. Since 1928.

Q. What is your business or occupation?

A. I am Ventura County game warden.

Q. How long have you been so engaged, Mr. White? A. This is my 20th year.

Q. Directing your attention to the month of October, 1949, in addition to holding the position

(Testimony of Jack White.)

of county game warden, did you have any other title with reference to a state enforcement officer or federal enforcement officer?

A. I have a deputy appointment under each, state and federal.

Q. In other words, during the month of October, 1949, you were also a deputy federal game warden and a deputy state warden? A. I was.

Q. Do you know Mr. Carty, Mr. Maxwell, Mr. McCormick, and the other gentlemen who are involved here in this case, sir? A. Yes, sir.

Q. The Douds? A. Yes, sir.

Q. You are familiar, are you not, with the premises of the Santa Clara Game Preserve?

A. Yes, sir.

Q. There has been some testimony that in times past you have been a guest of that club. Is that true? A. Yes, sir.

Q. And you have shot on it during the season?

A. Yes, sir.

Q. I have here before you what has been identified as Defendants' Exhibit A, as being an airplane view of that Santa Clara Game Preserve. Does that appear to you to fairly reflect from the air an aerial view of the Santa Clara Game Preserve as it appeared about in October, 1949?

A. Yes, sir, it does.

Q. With the opening of the season commencing on October 21, 1949, in connection with your official duties, did you make any check of the various gun clubs in the area? A. Yes, sir, all of them.

(Testimony of Jack White.)

Q. I am going to ask you if you made an inspection, one or more inspections of the Santa Clara Game Preserve. A. I made two.

Q. With reference to the first one, did anybody accompany you—withdraw that.

Do you keep a diary, which is part of the official record of your activities? A. Yes, sir, I do.

Q. Do you have your diary with you for the month of October, 1949? A. Yes, sir. [511]

Q. Can you refer to that diary and tell us on what date and with whom you first went to the Santa Clara Game Preserve?

A. It was on October 18th.

Q. With whom did you go?

A. Mr. Jim McCormick.

Q. And you went over the premises there?

A. Yes, sir.

Q. At whose request did you go out on that particular day, if anyone's?

A. Mr. Maxwell's.

Q. After you made this inspection with Mr. McCormick, what, if anything, did you say to either him or Mr. Maxwell as to what you found with reference to the grounds being available for hunting at the opening of the season on the 21st?

A. Could I refer to this?

Q. Please do.

A. Was in the office until 10:00 a.m., Oxnard, met McCormick and Maxwell regarding feeding. Said they had been told to quit feeding 10 days before season opens. Went to Santa Clara Club with

(Testimony of Jack White.)

Jim McCormick. No feeding since October 12th. Looked okay. Some beans and a little barley still out.

That was all that I have on that day pertaining to the [512] club.

Q. Do you recall as to whether or not you gave any opinion to Mr. McCormick or made any expression to Mr. Maxwell or Mr. McCormick on the basis of what you saw on the 18th as to whether or not they could hunt on the 21st?

A. Well, I went with Mr. McCormick, at the request of Mr. Maxwell, and with reference to this picture, we parked down by these bean wagons. We walked up this levee and inspected the levees over to the center road and back down the center road and back to the point of beginning. There were some beans along the road and a little scattered barley.

I told Mr. McCormick that in my opinion, the number of birds that were in there, that it appeared to me they would probably clean it up, and that I didn't think there was anything to worry about and saw no reason why they shouldn't go ahead and shoot.

Q. Did you likewise make another check of the club between that date—I think you said October 18th? A. That is correct.

Q. Did you go by there again in the course of your official duties between the 18th and the morning of October 21st? A. On October 20th.

Q. Does your diary likewise refer to your having been there then? [513] A. Yes, sir.

(Testimony of Jack White.)

Q. What did you find on that day?

A. 3:30 p.m., McGrath club, which is referred to sometimes as this same club—had a little feed still out and some beans the ducks won't eat. Feed had been out for some time. Not many ducks on club. 4:30 p.m., Point Magu Club, no feed. 5:20 p.m., Ventura Club.

Q. By the way, with reference to your entry there about "ducks won't eat beans," have you had any experience, Mr. White, in your 20-odd years as a game warden in determining whether or not lima beans are duck feed for ducks in that area.

A. I don't think they are duck feed.

Q. Going back again a moment, if I may, Mr. White, you said, I believe, that Mr. Maxwell called you on the 18th? A. Yes, sir.

Q. Did you have any conversation with him with reference to regulations?

A. Yes, sir, I did. He called me in the morning of the 18th at my office and asked me if there had been any change in the feeding regulations, and I told him not to my knowledge.

He said that he had been informed by Warden Edgerton that they were to stop feeding 10 days before the season opened. I told him that I knew nothing about it. [514]

I called Mr. Macklin, and he was out, and I called Mr. Spicer in Ojai and asked him if there had been any change in the regulations, and he said no.

I asked him, I told him I was concerned regard-

(Testimony of Jack White.)

ing the 10-day feeding period, and I asked him where he got it.

He said, well, they had all more or less determined that was the proper time to stop feeding, and he asked me where I had got by two or three day period.

I told him that I had gotten my information from Mr. Macklin, and he said, well, that they had decided 10 days was the proper time to stop feeding.

So, due to the controversial issue, I went to Oxnard and saw Mr. Maxwell and gave him the information he asked for. I told him that I thought probably the best procedure would be to call Mr. Macklin.

He said that he was going to the city and instead of calling Mr. Macklin, he would go in and see him.

Q. When you talked to Mr. Spicer and asked him about the regulations, did you tell him you were calling in connection with a request you had had from the members of the Santa Clara Game Preserve?

A. That's right. It was a point of information.

Q. This was all prior to the opening of the season?

A. That was on the morning of the 18th in the office.

Q. And thereafter, as you testified——[515]

A. I went to Mr. Maxwell's office and delivered the information I had obtained, and he asked me if I would mind going out and checking the club, and I told him I would be glad to.

(Testimony of Jack White.)

He called Mr. McCormick, and Mr. McCormick met me at Mr. Maxwell's office and we then proceeded to the Santa Clara Game Preserve, where we checked the club.

Mr. Irwin: You may cross-examine, Mr. Johnson.

Cross-Examination

By Mr. Johnson:

Q. You are a deputy federal game warden?

A. Yes, sir.

Q. When inquiring about what the regulations were, did you phone Mr. Elder, your superior, as a deputy federal game warden?

A. No. I believe Mr. Spicer told me he had talked to Mr. Elder and that was his interpretation, if I remember correctly.

Q. But you didn't call him?

A. No, sir. I tried to call Mr. Elder several times. It is very difficult to reach him. I have talked to him on occasions, though.

Q. As a matter of fact, you haven't been a county game warden for 20 years, have you?

A. Yes, sir, deputy and county game warden.

Q. Weren't you a fire warden up until 1943?

A. In 1931, I was employed by the Ventura County as a fire warden and deputy game warden February, 1931. In 1934, I was transferred to the Simi Valley as a deputy fire warden and game warden in charge of that area. In 1944, I was appointed as county game warden of Ventura County.

(Testimony of Jack White.)

Q. You shoot on the Santa Clara Club quite a bit, don't you?

A. I have shot there several times. I shoot at all the clubs.

Q. How long have you known Mr. Carty?

A. Oh, probably 18 years or so.

Q. How long have you known Mr. Maxwell?

A. Practically the same length of time.

Q. Are they good friends of yours?

A. I hope so.

Q. You say that on the 18th of October, you checked the Santa Clara Club with Mr. James McCormick? A. Yes, sir.

Q. That is James McCormick, who is a defendant here? A. Yes, sir.

Q. A member of the club? A. Yes, sir.

Q. This was at Mr. Maxwell's request?

A. Yes, sir. [517]

Q. You say there were some beans and a little barley there and they looked okay?

A. Well, with the number of ducks they had there, I told Mr. McCormick I believed it would be cleaned up sufficiently to allow shooting.

Q. May I see your diary?

A. Yes, sir. I doubt if you can read it.

Q. This is "office 10:00 a.m." That means you were at your office at 10:00 a.m.?

A. Until 10:00 a.m.

Q. "At Oxnard." A. Went to Oxnard.

Q. "Met McCormick and Maxwell."

A. That's right.

(Testimony of Jack White.)

Q. "Regarding feeding. They said they had beans."

A. No. They said they had been told.

Q. I am sorry.

A. They were told to quit feeding 10 days before season opened.

Q. I quess I can't read your writing.

A. That is my shorthand. [518]

* * *

Q. (By Mr. Johnson): Referred to October 21, what does this say here, starting with 9:30 p.m.?

A. "On October 21 at 9:30 p.m." that is the time I returned home. However, I made a notation here.

Q. What does it say?

A. I attended barbecue as a guest of the club. That is the Ventura Club.

Q. At 7:00 p.m.?

A. And was home at 9:30 p.m.

Q. I notice you say on October 20, 1949—correct me if I am wrong on this—3:30 p.m., McGrath Club. That is the Santa Clara Club? A. Yes, sir.

Q. "Had a little feed still out and some beans the ducks won't eat." Do you usually put in a remark that the ducks won't eat a particular thing when you report what is on the premises? In other words, you usually say they had beans which the ducks won't eat? A. That is correct.

Q. Referring to October 19 again, you say there were some barley, beans and some barley.

Mr. Irwin: The 18th. [519]

(Testimony of Jack White.)

The Witness: No, this is the 19th. This is a different club. It is the Gentry Club.

Q. (By Mr. Johnson): There were beans there?

A. That's right, and some barley.

Q. Was it the 18th you had your first inspection?

A. At the McGrath Club, yes, sir.

Q. That is what I mean. "Had beans." Where is it you say they had some beans and a little barley? Was that on the 21st or the——

A. It was on the 18th.

Q. Showing you Government's Exhibit 2 through 9, is that substantially the amount of beans and barley that you saw there at that time?

A. I don't know. Where is that in relation to this map?

Q. It is on the premises of the club as marked in these areas here. Each exhibit is referred to on Government's Exhibit No. 1, each area depicted in the photograph is referred to by a red square with a number under it, the number referring to the number of the exhibit which the photograph is.

A. I have never seen these. I wouldn't recognize them as being such, but the beans were along this area.

Q. Would you say that is a pretty accurate picture, for example, Government's Exhibit 7, of the amount of beans you saw on that road? [520]

A. It is hard to determine from a picture, but there were quite a few beans along the road.

Q. Showing you Government's Exhibit No. 8,

(Testimony of Jack White.)

that is the road you refer to, the one pictured there? A. That is correct.

Q. Would you say that pretty well portrays what you recall having seen on the 18th and the 20th? A. Approximately.

Q. Referring to Government's Exhibit No. 2, would you say that depicts the approximate amount of barley you saw on some of the areas?

A. Well, I don't recognize this area on this club.

Q. Testimony has been adduced to the effect that this particular area is right here——

Mr. Irwin: Pardon me, counsel. Be sure and say there are some controversies about that.

Q. (By Mr. Johnson): Assuming that it is right here.

A. No, sir. I never was up this far on this club.

Q. How far did you go on the club when you inspected it?

A. We came up to this levee—this levee here.

Q. That is No. 2, counting this as 1?

A. That's right.

Q. In other words, you came up to No. 2. Where else did you go? [521]

A. Walked across the levee, back down this middle road, and out here, down here.

Q. Excuse me. You walked up No. 2, west on the middle dike to cross dike No. 1, south to the south road, and then west to the west side?

A. Correct. There were—if I might add this, a great concentration of ducks were on this par-

(Testimony of Jack White.)

ticular levee, and I did not wish to disturb them.

* * *

Q. Why don't you describe the area for the record. A. This is levee——

Q. Look at the diagram. I think that might help.

A. I think that would be levee 3. Is that what this dike is here, levee 3?

Q. No, no. Here is 3.

A. Then it would be levee 2.

Q. Do mudhens eat lima beans?

A. Not to my knowledge.

Q. Why did all the other clubs and you put out lima beans, or why do duck clubs put them out, put them out in the Ventura area?

A. I don't know.

Q. But they do put them out? [522]

A. Yes, sir.

Q. This club has put them out before, too, hasn't it, Santa Clara? A. Yes, sir.

Q. As a matter of fact, you were shooting there on December 30, 1948, were you not, while there were beans on the premises?

A. I don't know whether I shot there on December 31st or 30th or not.

Q. But you shot that season? A. Yes, sir.

Q. And you signed the register book that they maintained every time you shot?

A. No, I don't believe I did.

Q. Well, somebody else signed it for you?

A. I don't know.

(Testimony of Jack White.)

Q. On the 20th of October, you indicted, according to your diary, this club, the Santa Clara Club, at 3:30 p.m., and marked "Little feed, some beans and barley. Out some time"? A. Yes, sir.

Q. How did you determine they had been out some time?

A. Mr. McCormick told me when he put them out.

Q. Did you examine them to see whether you could tell personally that it had been out some time?

A. No, sir.

Q. What kind of reports do you make as county game warden?

A. Quarterly reports to the board of supervisors of Ventura County, one copy going to Mr. Earl Macklin, the assistant chief of patrol in charge of the Los Angeles office, one to the San Francisco office, the Division of Fish and Game, and one in my file. [524]

* * *

Q. (By Mr. Johnson): You don't make any weekly reports, do you?

A. No, sir, only in my diary.

Q. The only report you make is a quarterly report? A. Yes, sir. [525]

* * *

Q. (By Mr. Johnson): Do you know Ed White, who is the caretaker of the Ventura County Game Club? A. Yes, sir.

Q. Do you remember phoning him on the night of October 20, 1949? A. No, sir.

(Testimony of Jack White.)

Q. Isn't it a fact that on or about that date, you [527] phoned him and told him that the Santa Clara Club had grain and beans on it?

A. No, sir. He has no telephone. I have never telephoned him.

Q. Did you have a conversation with him at all on those dates in that regard? A. The 19th?

Q. Well, the 19th, on or about the 19th or 20th?

A. I had a conversation with Mr. White at the club on the evening of the 20th about 5:30.

Q. I am sorry. It was not a phone call. That was purely an error on my part. Did you tell him at that time that the Santa Clara Club had barley and beans there?

A. No, sir. We did not discuss the condition of any club.

Q. You didn't discuss the Santa Clara Club at all? A. No, sir.

Q. On the next morning, the morning of the 21st, isn't it true you called Warden John Spicer and told him that you had inspected all clubs and that they were all clean?

A. No, sir. I had no telephone conversation with Mr. Spicer on the morning of the 21st of October.

Q. Did you have one on the morning of the 20th?

A. No, sir, on the 18th.

Q. Did you have a personal conversation with him? [528] A. No, sir.

Q. Where did you get this figure of 72 hours?

A. From Mr. Macklin, the assistant chief patrol

(Testimony of Jack White.)

at Los Angeles. If I might explain, your Honor?

The Court: Yes.

The Witness: Well, I don't work directly under Mr. Macklin. I have always regarded him very highly, and in his position I have always considered what he gave any of his men pertained to me, and whenever I am in doubt, I usually call him for any interpretation of the law or for anything that I am a little in doubt about.

I called Mr. Macklin regarding his opinion on the feeding situation, and he told me he thought they should quit feeding at least three or four days before the season opened. That was last year. I don't know, I guess I said, "Seventy-two hours?" And he said, "Yes." He said, "That's all right, three days." That is what I have gone by.

Q. (By Mr. Johnson): He also said, did he not, it had to be cleaned up as of the time they started to shoot?

A. I don't recall that he said that, but I am sure that was the interpretation.

Q. You knew that, didn't you?

A. Yes, sir.

Q. You understood then and do now that this is a federal regulation, isn't that correct? [529]

A. Yes, sir.

Q. Did you ever attempt to get an interpretation of this regulation from the federal people in line with your duty as a deputy federal game warden?

(Testimony of Jack White.)

A. No, sir. I have always taken my orders from Mr. Macklin.

* * *

Mr. Irwin: May it please the court, ladies and gentlemen of the jury: Government counsel and myself have entered into a stipulation which, with the court's permission, I will now read at this time.

The defendants, E. C. Maxwell, Edwin Carty and James McCormick, have testified for the defense. The remaining defendants are and have been in court and are ready and willing to testify. I am going to pause at this moment and ask them to stand and be identified. Mr. H. W. McCormick, Mr. Eugene Doud, Mr. James R. Doud, Mr. Vincent Doud, Raymond E. Farrell, Robert Maulhardt.

All these gentlemen have been in court and are ready and willing to testify. However, it is stipulated between the prosecution and the defense that should these remaining defendants take the stand, their testimony would be cumulative [530] in that they would likewise testify as to their presence at the Santa Clara Game Preserve on October 22, 1949, and that they did also shoot and take ducks on said date.

This stipulation is made in the interest of saving time and should in nowise be regarded as prejudicial to either the government or the defense.

The Court: It may be so stipulated.

Mr. Irwin: So stipulated, Mr. Johnson?

Mr. Johnson: Yes, so stipulated.

Mr. Irwin: Thank you, sir. With the acceptance

(Testimony of Jack White.)

of that stipulation, your Honor, and it having been made a part of the record, the defense rests. [531]

* * *

CARLOS GETMAN

called as a witness on behalf of the government in rebuttal, having been previously duly sworn, testified as follows:

Direct-Examination

By Mr. Johnson:

Q. I believe you have already testified you are a state game warden? A. That is true.

Q. And you are familiar with the area in Ventura County, are you not? [532] A. I am.

Q. Directing your attention to the date of on or about December 28, 1948, did you have occasion to inspect the premises of the Santa Clara Game Preserve on that date, or did you not?

A. I did.

Q. Was that during the open season?

A. It was.

Q. What did you find the condition of the Santa Clara Game Preserve to be on that date?

A. On that particular day, I observed six geese out on the dike.

Q. What were they doing?

A. They apparently were feeding.

Q. What else did you observe, if anything?

A. I was quite interested in them, and that was the closest I ever got to geese, and I thought I

(Testimony of Carlos Getman.)

would see how close I could get to them, and so I hiked out on the dike, and I noticed they had been feeding out there at that time. As I approached them, they flew away.

Q. What did you observe as to the condition of the premises of this club?

A. They had lima beans on that dike.

Q. What dike was it, referring to this diagram, if you will? [533]

A. That was the middle dike.

Q. Where did you see the geese?

A. They were approximately at the first pond.

Q. Near the middle dike?

A. That is correct.

Q. Did you observe anything else?

A. I observed barley. There was barley on the dikes at that time.

Q. On the dikes of this club?

A. There was.

Q. Where was it, what dikes had barley, if you recall? A. It was the south road.

Q. What kind of barley was it?

A. It was just whole barley.

Q. Was there anything else mixed in with it?

A. I didn't notice it at the time, no.

Q. Did you look it over? A. I did.

Mr. Irwin: You are talking about 1948, aren't you, Mr. Johnson?

Mr. Johnson: Yes. [534]

* * *

(Testimony of Carlos Getman.)

Q. Let me hand you Government's Exhibit No. 10 and ask you if that is the general type of barley you saw on the premises at that time.

A. It was.

Q. The same type of barley? A. Yes.

Q. Did you, after you observed the premises in this condition, do anything?

A. I called my immediate supervisor, Captain Fred Hecker.

Q. Is he now dead? A. He is.

Q. What did you do then, or what did you say to him?

A. I told him the conditions, and I told him there was feed on the dikes, and he in turn told me he would contact Warden Spicer. [535]

Q. Did you do anything more in regard to this matter in the next day or two?

A. Well, it was the following two or three days, the following two days, I believe it was, that Warden Spicer and I made an investigation of the club.

Q. What date was that, approximately?

A. That was the 29th and 30th of December.

Q. You and Warden Spicer together inspected the club? A. We did.

Q. Did you observe the condition of the premises at that time? A. We did.

Q. What did you find it to be?

A. They had lima beans and barley on at that time.

(Testimony of Carlos Getman.)

Q. What did you do after that occasion, if anything? A. Agent Elder was notified.

Q. Did you again call upon the premises of the club? A. We did.

Q. On what date was that, if you know?

A. January 1.

Q. Who was with you on that occasion?

A. Agent Elder and Agent Spicer and myself.

Q. What did you find the condition of the premises to be on that occasion?

A. Beans and barley on them. [536]

Q. Were all of these dates, that is December 28th, December 29th, and January 2nd, during open season? A. They were.

* * *

JOHN SPICER

called as a witness on behalf of the government in rebuttal, having been previously duly sworn, testified as follows:

Direct-Examination

By Mr. Johnson:

Q. You have already testified you are a state game warden? A. Yes.

Q. Located in Ventura County? A. Yes.

Q. Directing your attention to on or about December 28, 1948—I don't mean December 28th, I mean December 30th, 29th or 30th, 1948, did you have occasion to call upon the premises of the Santa Clara River Game Preserve?

A. Yes, I did. [537]

(Testimony of John Spicer.)

Q. How did you happen to call upon their premises?

A. Well, I was in San Luis Obispo on additional duty when Warden Getman called Captain Hecker, and Captain Hecker in turn told me of the situation, and I left San Luis Obispo and came back down to Ventura County, and I accompanied Warden Getman to the Santa Clara Game Preserve.

Q. Did you enter the premises then of the Santa Clara Game Preserve? A. Yes, sir, I did.

Q. Did you observe the condition of the premises? A. Yes,. I did.

Q. What were the conditions of the premises on that date?

A. Well, as far as grain went, there was both barley and lima beans on the club.

Q. Barley and lima beans? A. Yes.

Q. Can you tell in general the areas in which you found them, if you remember?

A. Well, I believe it was the middle dike. I say in the vicinity of cross dike 2, 1, 2 or 3.

Q. Did you take any action after observing the condition of the premises, or did you not?

A. I beg your pardon?

Q. Did you take any official action after making this [538] observation, or did you not?

A. I contacted Agent Elder.

Q. He is of the United States Wildlife Management? A. Yes, he is.

Q. What then occurred, if anything?

A. On the first day of January, I accompanied

(Testimony of John Spicer.)

him again to the ponds of the Santa Clara Game Preserve.

Q. Was Mr. Getman present at that time?

A. Yes, he was.

Q. What did you observe?

A. Well, we observed the same condition there as we had seen the previous day.

Q. Did you have occasion on or about that time to have a conversation with Mr. Carty?

A. I believe that evening Mr. Carty called me and said something about he understood the club had been closed to shooting. I informed him it was a federal matter, that the best thing for him to do would be to contact Mr. Elder.

Cross-Examination

By Mr. Irwin:

Q. Are you sure, Mr. Spicer, you didn't tell a Mexican employee on the ranch this Thursday night they were not to shoot, and that it was the following morning you talked——

A. No. I talked to the Mexican keeper that evening [539] and asked him if he knew Mr. Carty, and he said he did. I think I asked him if he knew several of the members, and I believe he said he did, and then I told him that it would be necessary for him to contact them and tell them that we had been out.

Q. Wasn't it in fact the following morning you talked to Mr. Carty?

(Testimony of John Spicer.)

A. No. I believe he called me that evening.

Q. You wouldn't be sure?

A. Yes, I am quite sure.

* * *

A. W. ELDER

called as a witness on behalf of the government in rebuttal, having been previously duly sworn, testified as follows:

Direct Examination

By Mr. Johnson:

Q. You have already stated you are a federal wildlife management agent in this area?

A. That's right.

Q. Your area covers Oxnard and Ventura County? A. That is correct.

Q. Did you have occasion on or about the 1st of January, 1949, [540] to call upon the premises of the Santa Clara Game Preserve?

A. I did.

Q. What were the circumstances which caused you to make that call?

A. I returned from a patrol trip, oh, around 7:00 o'clock in the evening on the 31st of December, and there was a note there at home to call the operator at Ojai for Warden Spicer. I did, and Warden Spicer asked me if I could come up right away, that the Santa Clara River Game Preserve was baited with barley and lima beans.

(Testimony of A. W. Elder.)

I arranged with Warden Spicer to meet him the next morning at the Ventura police station.

Q. Did you then meet him and proceed to the premises of the club?

A. I met Warden Spicer and Warden Getman.

Q. And did you enter the premises of the club?

A. We drove to the premises of the club and entered the club grounds.

Q. Did you observe the premises of the club?

A. I covered nearly every foot of it.

Q. What did you observe as to the condition of the premises, if anything?

A. The first thing that struck my attention was while walking west on that center road dike, there was an enormous [541] amount of lima beans that had been there. The beans had been soaked——

Q. What do you mean "had been there"?

A. Some were still there. I was going to say they had been out long enough so that the skins had been wet and slipped off, and in places there was quite a large quantity of just skins alone. The beans were gone. They were in the water, in the corners, where the prevailing wind had apparently moved all these skins up into one corner. There was several inches thick of just skins, no beans. At a few points, there was still a few grains of barley. I would say at the time I visited the club that the barley was fairly well cleaned up.

Q. But you did see some evidence of barley?

A. I saw enough barley to make an arrest if there had been any shooting.

(Testimony of A. W. Elder.)

Q. What official action, if any, did you take after this?

A. Well, the next thing I did was inspect, or talk to the Mexican keeper and look at the one sack of barley that he had not put out. There was still one sack of barley in the cook shack. I got his story as to how it happened barley was put out two or three days before.

Q. And subsequent to that occasion and in regard to that occasion, did you have a telephone conversation with Mr. [542] Edwin L. Carty?

A. When I returned home on the night of January 2nd, my wife advised me Mr. Carty had called and wanted to talk to me. I was more anxious to get a report off to my chief about the circumstances on this club, so I came to the office and did not answer the phone call or did not return the call then, but the next morning, in the forenoon sometime, I received a call from Mr. Carty.

Q. What was said during that conversation?

A. Well, Mr Carty told me that he had been president of the Santa Clara Game Preserve and Gun Club, but he had resigned that upon being appointed to the Fish and Game Commission, and he said that—rather, he said Mr. McCormick had been told by someone that they could feed to within 72 hours. I asked him where he got that information.

He stated that Mr. Jack White had told Jim McCormick that such would be the case.

I thoroughly explained the regulations to Mr. Carty. I did not overlook one little thing, because

(Testimony of A. W. Elder.)

I wanted to point out the facts of the violation as it existed, then in the middle of the season.

Mr. Carty said, well, he says, "The members of this club look to me to straighten this matter out on account of my position."

I then asked if he would put that in a letter or give me [543] a letter stating the fact as to how they obtained the information that they could feed to within 72 hours.

He said, "Well, I can't do that in my position." He said, "I will have Mr. McCormick do it, as, after all, Mr. McCormick is the man he talked to." At the same time he gave me Mr. McCormick's name and address.

Mr. Carty stated that he had some important guests that had missed the shooting on the day before when the club was closed, that is the Sunday of January 2nd, no one shot that day, one of their regular scheduled shooting days, and he would like very much if he could take these guests up once more before the season closed, which would close on the 8th of January, and that he himself, owing to pressure of business, would not be able to shoot except on Thursday, January 6th.

He stated that the lima beans and barley had been cleaned up to the best of his knowledge and wanted to know if it would be okay if he shot.

I told him, under the circumstances, that I thought it would be okay, but that I wanted this letter, because if someone who purported to be a deputy federal warden had given the information that they

(Testimony of A. W. Elder.)

could feed to within 72 hours, I wanted to make a complete investigation.

Q. Who was that someone?

A. Jack White. [544]

Q. Did you subsequently receive the letter which you requested?

A. No. I waited nearly two weeks and the letter I had requested had not been received, so I accordingly wrote to Mr. McCormick, asking him for the information.

Q. I show you Government's Exhibit 15 in evidence, and ask you if that is the letter which you wrote to Mr. McCormick.

A. That is the letter.

Q. Did you receive a reply from him?

A. I received a reply a few days later. [545]

* * *

Q. Referring to defense Exhibit B, that is a letter which you received from Mr. McCormick?

A. That is correct.

Q. Why didn't you answer it right away?

A. Why didn't I answer that right away? I received the letter and it was definitely not an answer to my letter and had no bearing on the information I was seeking, nor Mr. Carty, to take care of the situation.

* * *

Cross-Examination

By Mr. Irwin:

Q. I think you stated before, and I won't go

(Testimony of A. W. Elder.)

into it in great detail, you never did answer that?

A. That is correct.

Q. I think you also said on direct here a moment or two ago, in the conversation with Mr. Carty, that a discussion was had on how the club had missed the shooting day on January 2nd?

A. That is correct. [546]

Q. This was, of course, pursuant to the statement that you had advised the Mexican game keeper, or whoever it was, that they shouldn't shoot because of the condition?

A. That is not right. I did not say that.

Q. I know you didn't say it, but I suppose you advised him on January 1st not to shoot?

A. I didn't advise anyone not to shoot.

Q. I thought you told that to the game keeper.

A. I did not say that.

Mr. Johnson: That was Mr. Spicer.

* * *

JOHN SPICER

recalled as a witness on behalf of the government in rebuttal, was examined and testified further as follows:

Direct Examination

By Mr. Johnson:

Q. Mr. Spicer, showing you Defendants' Exhibit H and referring to the dates of October 16th and 21st, in each of which entries therein it states, "With Palmer, U.S.F.S. to [547] Santa Clara river-

(Testimony of John Spicer.)

bottom gun clubs and Hueneme, Point Magu," and on the 21st it says, "To Santa Clara riverbottom and gun clubs checking hunters," could you explain those entries made by you on the 16th and on the 21st?

A. Well, in the first place, actually there isn't enough room on these reports to cover our daily activities in detail, so most of our superiors, being men of the field, especially Inspector Macklin, who worked that area before he came to Los Angeles, knows the area as well as we do, if not better, so he has never requested us to go into detail on our daily patrol report, except to show certain areas that we work.

Now, when I say "Santa Clara riverbottom," I don't necessarily mean the area adjacent to the Santa Clara Game Preserve. I mean the whole Santa Clara riverbottom where hunting takes place over and down as far as the mouth. The mouth is open to public hunting, and there is a great deal of activity there.

Then we traveled out of the Santa Clara riverbottom on this particular day to the McGrath Lake area and down through Hueneme and the Point Magu area and went where the other clubs are situated. So that is my explanation in two lines of why I said what I did.

Q. Does that mean, referring to the date of the 16th, that you visited the premises of the Santa Clara River Game [548] Preserve?

A. No, it doesn't necessarily mean that.

(Testimony of John Spicer.)

Q. Did you visit there that day? A. No.

Q. Referring to the 21st of October, Friday, October 21, would you explain that?

A. Well, that is about the same, the Ventura and Santa Clara riverbottom and gun clubs, checking hunters, with Warden Edgerton checking ditches and riverbottoms. That practically covers the same area. As I said, our inspector is familiar with the area and he knows just about where we are. I took just about all the space there was for that day just to say that.

Q. You testified on direct in behalf of the government that you did visit the premises of the Santa Clara River Game Preserve on the evening of the 21st of October. Does this "and gun clubs checking hunters," refer to that visit?

A. No, I don't believe so.

Q. What does that mean?

A. This pertains to the Point Magu Game Preserve and Ventura County Gun Glub.

Q. In other words, you did not visit the Santa Clara Game Preserve before 6:00 p.m. on the 21st, as you previously testified? A. No, I did not.

Cross-Examination

By Mr. Irwin:

Q. Forgive me, Mr. Spicer, if I seem to have a little difficulty understanding you. I understand these weekly reports are taken from your diary, is that correct? A. Yes, they are.

(Testimony of John Spicer.)

Q. The first line of your report to the office of October 16th, 1949, says, "With Palmer U.S.F.S. to Santa Clara riverbottom, gun clubs." The Santa Clara Game Preserve is in the Santa Clara riverbottom, isn't it?

A. It is. There is a comma after Santa Clara riverbottom, gun clubs, and Hueneme-Point Magu.

Q. All right. Well, comma, semicolon, or what have you, what gun club did you visit at the Santa Clara riverbottom?

A. I didn't visit any at the Santa Clara riverbottom. I went with Palmer to the Santa Clara riverbottom, checking the riverbottom and mouth of the river. I then went to the gun club at the Hueneme gun clubs at the Hueneme-Point Magu area.

Q. Just a moment. That comes later. You say "Santa Clara riverbottom, gun clubs," and then Hueneme-Point Magu.

A. The gun clubs on that particular day refer to the Ventura County and the Point Magu Game Preserve. [550]

Q. By the way, you had heard from Mr. Getman the day previous, on the 15th, of his conversation with Mr. McCormick about Mr. McCormick being disturbed about conditions at the club, hadn't you?

A. I don't remember. I was in court at Carpinteria at the time. I don't remember.

Q. You heard Mr. Getman so testify?

A. Yes..

* * *

L. F. EDGERTON

called as a witness on behalf of the government in rebuttal, having been previously duly sworn, testified as follows:

Direct Examination

By Mr. Johnson:

Q. You have already testified you observed conditions of the premises of the Santa Clara River Game Preserve on the evening of the 21st and on the morning of the 22nd of October, 1949?

A. Yes, I did.

Q. I show you Defendants' Exhibit L which, according to the testimony, represents cross dike No. 4 on the premises [551] of that club. I ask you if you observed the condition of that particular dike No. 4 on the 22nd of October?

A. Yes. I walked down that dike myself on the morning of the 22nd.

Q. Did you observe this particular duck blind portrayed in the foreground of that picture?

A. I couldn't personally say that is on the No. 4 dike. I observed a duck blind on No. 4 dike.

Q. You observed the duck blind?

A. I observed the duck blind. [552]

* * *

Q. (By Mr. Johnson): Go ahead and tell what you observed.

A. On this particular dike, there was barley strewn down the dike.

Q. Could you describe it more fully?

(Testimony of L. F. Edgerton.)

A. Well, I won't say exactly, but I went over two or three dikes right in that area, and the barley was on the dikes in one of two manners, either in a long line or in piles, one of the two.

Q. Showing you Defendants' Exhibits J and K, which likewise are purported to be pictures of dike No. 4, cross dike No. 4, letter J purports to be looking north from the south road along that dike. Did you observe conditions in that area on the 22nd of October?

A. Well, if that is dike 4 looking north from the south road, that would be the same picture, except the opposite [553] direction.

Q. I guess it would.

A. It would be the same condition.

Q. And Exhibit K purports to be looking from the middle dike toward the south road. That would be the same then, wouldn't it?

A. That would be the same picture with the length of the whole dike in there.

Q. You traversed the length of that dike, did you? A. I walked the length of the dike.

Q. And you made your observation, as you testified?

A. There was barley on the dike. [554]

* * *

ED WHITE

called as a witness on behalf of the government in rebuttal, having been previously duly sworn, testified as follows:

Direct Examination

By Mr. Johnson:

Q. Mr. White, did you on or about the day before the opening of the hunting season of last year, which would be about the 20th of October, have a conversation with County Game Warden Jack White? A. Yes.

Q. Where did this conversation take place?

A. At my place, in the yard.

Q. Who else was present, if anybody?

A. Nobody else.

Q. Was the subject of the Santa Clara River Game Preserve discussed at that time? [559]

A. Yes.

Q. What was said by you and by Mr. White in that connection?

A. Well, Mr. White told me that they had some feed out over at the other duck club?

Q. What did you say?

A. I asked him which one, and he said the Santa Clara.

Q. What else was said?

A. Well, there wasn't much else said, only that I asked him what he was going to do about it.

Q. What did he say? A. He didn't know.

Q. Anything else you can recall?

A. No, I can't recall anything else, just the run of conversation. [560]

* * *

INSTRUCTIONS TO THE JURY

The Court: Ladies and gentlemen of the jury, it is my duty now to instruct you as to the law of this case.

You have heard the evidence and the argument. Now it is the duty of the court to instruct you as to the law governing the case. It is your duty, as jurors, to follow the law as stated in the instructions of the court and to apply the law so given to the facts as you find them from the evidence before you. You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole.

Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your sworn duty to base a verdict upon any other view of the law than that given in the instructions of the court.

You have been chosen and sworn as jurors in this case to try the issues of fact presented by the allegations of the information and the denial made by the plea of the accused. You are to perform this duty without bias or prejudice as to any party. The law does not permit jurors to be governed by sympathy, prejudice, or public opinion. The accused and the public expect that you will carefully and impartially consider all the evidence, follow the law as stated by the court and reach a just verdict, regardless of the consequences. [561]

An information is but a formal method of accusing a defendant of a crime. It is not evidence of any kind against the accused, and does not create

any presumption or permit any inference of guilt.

There are two types of evidence from which a jury may properly find a defendant guilty of an offense. One is direct evidence—such as the testimony of an eye witness. The other is circumstantial evidence—the proof of a chain of circumstances pointing to the commission of the offense.

As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that, before convicting a defendant, the jury be satisfied of the defendant's guilt beyond a reasonable doubt from all the evidence in the case.

In order to justify a verdict of guilty based in whole or in part upon circumstantial evidence, the facts in the chain of circumstances shown by the evidence must be consistent with the guilt of the accused, and inconsistent with every reasonable supposition of innocence.

If the facts and circumstances shown by the evidence are as consistent with innocence as with guilt, the jury should acquit the accused.

Statements and arguments of counsel are not evidence in the case, unless made as an admission or stipulation of fact. When the attorneys on both sides stipulate or agree as to the [562] existence of a fact, the jury must accept the stipulation as evidence and regard that fact as conclusively proved.

The evidence in the case consists of the sworn testimony of the witnesses, all exhibits which have been received in evidence, all facts which have been admitted or stipulated, and all applicable presumptions

stated in these instructions. Any evidence as to which an objection was sustained by the court, and any evidence ordered stricken by the court, must be entirely disregarded.

You are to consider only the evidence in the case. But in your consideration of the evidence you are not limited to the bald statements of the witnesses. On the contrary, you are permitted to draw, from facts which you find have been proved, such inferences as seem justified in the light of your experience.

An inference is a deduction or conclusion which reason and common sense lead the jury to draw from facts which have been proved.

A presumption is an inference which the law requires the jury to make from particular facts, in the absence of convincing evidence to the contrary. A presumption continues in effect until overcome or outweighed by evidence to the contrary; but unless so outweighed the jury are bound to find in accordance with the presumption.

Relative to the testimony pertaining to the character of [563] the defendants in respect to those traits of character which ordinarily would be involved in the commission of a crime like that charged in this case, I instruct you as follows:

Such evidence is regarded by the law as relevant to the question whether defendant is innocent or guilty of the crime charged, because the jury may, if its judgment so directs, reason that it is improbable that a person of good character in such respects would have conducted himself as alleged.

Character evidence of itself may be sufficient to raise a reasonable doubt whether or not defendant is guilty, which doubt otherwise would not exist. Hence you must consider such evidence in connection with all other evidence in the case.

But if, after weighing all the evidence, you are convinced beyond a reasonable doubt that the defendant is guilty of the crime charged against him in the information, your duty will be to find him guilty of that offense, notwithstanding the testimony that he was or is a person of good character.

The defendants, and each of them, have introduced evidence of their good character. This evidence stands uncontradicted.

The purpose and function of character evidence is to generate in your minds a reasonable doubt, and it is to be considered by you regardless of whether the other evidence [564] in the case is clear or doubtful. Therefore, when you consider, as you must, the character evidence introduced along with all the other evidence in the case, if a reasonable doubt exists as to a defendant's guilt, then, as to such defendant, he, and each of them, is entitled to an acquittal.

Of course, mere proof of good character does not entitle a defendant to an acquittal, but it is equally true that evidence of good character, when considered along with all the other evidence in the case, may be the factor which creates the reasonable doubt which entitles the defendant to an acquittal.

A defendant who wishes to testify is a competent witness; and the defendant's testimony is to be

judged in the same way as that of any other witness.

The rules of evidence ordinarily do not permit a witness to testify as to his opinions or conclusions. An exception to this rule exists in the case of an expert witness. A witness who by education and experience has become expert in any art, science or profession, may state his opinion as to a matter in which he is versed and which is material to the case, and may also state the reasons for such opinion. You should consider each expert opinion received in evidence in this case and give it such weight as you think it deserves; and you may reject it entirely if you conclude the reasons given in support of the opinion are unsound. [565]

During the course of the trial, I occasionally ask questions of a witness, in order to bring out facts not then fully covered in the testimony. Do not assume that I hold any opinion on the matters to which my questions related. Remember at all times that you, as jurors, are at liberty to disregard all comments of the court in arriving at your own finding as to the facts.

It is the duty of the court to admonish an attorney who, out of zeal for his cause, does something which is not in keeping with the rules of evidence or procedure.

You are to draw no inference against the side to whom an admonition of the court may have been addressed during the trial of this case.

It is charged in the information that on or about October 22, 1949, in Ventura County, California, within the jurisdiction of this court, the defendants

Edwin L. Carty, H. W. McCormick, Eugene Doud, James R. Doud, Vincent Doud, Raymond E. Farrell, James D. McCormick, Robert Maulhardt, and Edward C. Maxwell, without being permitted so to do by any regulation, made, adopted, and approved under authority of the Migratory Bird Treaty Act of July 3, 1918, as amended, did take, hunt, and kill migratory waterfowl and migratory game birds over ponds and areas which had been baited by the means, air, and use of shelled grain, namely, barley and cracked lima beans which had been deposited, distributed, [566] and scattered over the ponds and areas so as to constitute a lure, attraction and enticement to said migratory game birds; contrary to the provisions of the Migratory Bird Treaty Act and the regulations relating thereto as duly proclaimed pursuant to law.

You are instructed that the Rules of Criminal Procedure permit the trial of several defendants under one information as in the instant case. However, each defendant is entitled to your separate and considered verdict, with the law as I have given it to you to be applied to each separate defendant in your deliberations concerning him. It is, therefore, possible that you may agree as to your separate verdicts on each and every defendant. It is also possible that you may agree as to a defendant, or defendants, and disagree as to other defendants in this case.

Section 703 of Title 16, United States Code, provides in part that:

"Unless and except as permitted by regulations

made as hereinafter provided in Sections 703-710 of this title, it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill, possess," * * * (or) * * * "any migratory bird * * * included in the terms of the conventions between the United States and Great Britain for the [567] protection of migratory birds concluded August 16, 1916 (39 Stat. 1702), and the United States and the United Mexican States for the protection of migratory birds and game mammals concluded February 7, 1936. * * *"

On July 29, 1948, the President of the United States approved and proclaimed a regulation propounded by the Fish and Wildlife Service of the United States, Department of the Interior, under the authority of the Migratory Bird Treaty Act which I have just read to you. That regulation provides in Section 6.3, in part, as follows:

"Waterfowl (except for propagating, scientific, or other purposes under permit issued pursuant to Section 6.8), and mourning doves and white-winged doves are not permitted to be taken, directly or indirectly, by means, aid, or use of shelled, shucked corn, or of wheat or other grain, salt, or other feed that has been so deposited, distributed, or scattered as to constitute for such birds a lure, attraction, or enticement to, on, or over the area where hunters are attempting to take them: Provided, however, such birds may be taken over properly shocked corn and standing crops of corn, wheat, or other grain

or feed, and grains found scattered solely as a result of agricultural harvesting." [568]

Thus, this regulation which I have just read to you has the effect of law, since it was propounded under the authority of the Migratory Bird Act of 1918, as amended.

Section 707 of Title 16, United States Code, provides in part that:

"Any person, association, partnership, or corporation who shall violate any of the provisions of said conventions or sections 703-711 of this title, or who shall violate or fail to comply with any regulation made pursuant to said sections, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be * * * (punished as the law provides). Thus, there are two essential elements of the offense charged in the information:

First: The taking, hunting, or killing of migratory game birds;

Second: Over ponds or other hunting areas by means, aid, and use of shelled grain or other feed distributed thereover so as to constitute a lure, attraction and enticement to such birds.

There has been testimony that barley and lima beans were found on the premises. It is admitted that barley is grain. The testimony is conflicting as to the amount of barley found on the Santa Clara Game Preserve. It is for your determination [569] as to whether it was present in such quantities as to constitute a lure or enticement for the ducks present, which have been estimated variously between 4000 and 12,000 in number.

As to the lima beans, you must first determine whether, under the terms of the regulations, lima bears are in the category of "other feed," which will lure, entice or attract migratory birds.

You are further instructed that in a case of this sort, it is not necessary for the government to allege or to prove at trial that a defendant or defendants had knowledge of unlawful baiting over hunting grounds to find him guilty of the offense charged. In such case, guilty knowledge or intent is no part of the issue of the case. In this regard it is required that hunters shall investigate at their peril the conditions surrounding the fields and areas in which they are doing their hunting. Thus, the fact that a particular defendant may claim he did not know the area in which he was hunting was baited as charged in the information may not be considered by you in determining his guilt or innocence of the crime charged. He was under a positive duty to investigate for such conditions before hunting in the area. You are instructed that hunters have no property right in migratory birds, but only such permissive privileges as governmental authorities decree. [570]

Nor is the government's power to protect or regulate the hunting of migratory waterfowl confined to those lands to which it has title.

You are instructed that you need not be concerned whether the particular birds in this case are in fact migratory, that is, whether they have actually ever been anywhere other than California in their native haunts; for once the evidence establishes that the particular birds taken are of the species or type

included in the Migratory Bird Treaty and the Congressional Act and Regulations in connection therewith, the question of whether those particular birds actually went out of this state or were raised in this state, or whether they came from Canada, or elsewhere, is not in issue. The only issue, then, is whether the defendants hunted or killed the migratory birds as charged in the information.

In this connection testimony has been produced to the effect that the birds taken from defendants by the enforcement officers, involved in this case, were of the following types: Sprigs, also known as Pintails, Spoonbill, Greenneck Teals, Redheads, Widgeons, and Cackling Geese.

You are therefore further instructed that as a matter of law all birds of these types are migratory birds within the meaning of the Treaty and the statute and regulations concerned in this case.

You are instructed that the regulations concerning the [571] baiting of migratory birds is violated whether the hunters had pursued the indirect method of baiting before the season opened so as to keep the birds in the hunting area to be shot after the season opens, whereupon the hunters may flush them as they walk or punt over the preserves, or by directly placing the grain or other feeds in front of the blinds or stands during the season.

Furthermore, concerning the provisions in the regulation that migratory birds are not permitted to be taken "directly or indirectly" by means of bait, you are instructed that the word "indirectly" equally applies to any luring of the birds by grain

or other feed to the hunting area, regardless of whether the grain or other feeds is spread before the bird blinds themselves or is more widely scattered.

The law presumes a defendant to be innocent of any crime. This presumption of innocence continues throughout the trial, and has the weight and effect of evidence in favor of the accused. You must consider the evidence in the light of this presumption. The presumption of innocence is sufficient to acquit a defendant, unless the presumption is outweighed by evidence satisfying the jury beyond a reasonable doubt of the defendant's guilt.

A reasonable doubt is a fair doubt based upon reason and common sense and arising from the state of the evidence. It is rarely possible to prove anything to an absolute certainty. [572] Proof beyond a reasonable doubt is established if the evidence is such as you would be willing to rely and act upon in the most important of your own affairs. A defendant is not to be convicted on mere suspicion or conjecture.

A reasonable doubt may arise not only from the evidence produced, but also from a lack of evidence. Since the burden is upon the prosecution to prove the accused guilty beyond a reasonable doubt of every essential element of the crime charged, a defendant has the right to rely upon a failure of the prosecution to establish such proof. A defendant may also rely upon evidence brought out on cross-examination of witnesses for the prosecution. The

law does not impose upon a defendant the duty of producing any evidence.

A reasonable doubt exists in any case when, after careful and impartial consideration of all the evidence, the jurors do not feel satisfied to a moral certainty that a defendant is guilty of the charge.

You are instructed that the presumption of innocence with which the defendants are at all times clothed is not a mere form to be disregarded by you at pleasure, but that it is an essential substantial part of the law of the land, and binding on you in this case, and it is your duty in this case to give the defendants the full benefit of this presumption and to acquit the defendants unless the evidence in this case convinces you of their guilt as charged beyond a reasonable [573] doubt.

You, as jurors, are the sole judges of the credibility of the witnesses and the weight of their testimony deserves. A witness is presumed to speak the truth. But this presumption may be outweighed by the manner in which the witness testifies, by the character of the testimony given, or by contradictory evidence. You should carefully scrutinize the testimony given, the circumstances under which each witness has testified, and every matter in evidence which tends to indicate whether the witness is worthy of belief. Consider each witness' intelligence, motive and state of mind, and demeanor and manner while on the stand. Consider also any relation each witness may bear to either side of the case; the manner in which each witness might be affected by the verdict; and the extent to which,

if at all, each witness is either supported or contradicted by other evidence.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause the jury to discredit such testimony. Two or more persons witnessing an incident or a transaction may see or hear it differently; and innocent misrecollection, like failure of recollection, is not an uncommon experience. In weighing the effect of a discrepancy, consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error or [574] willful falsehood. If you find the presumption of truthfulness to be outweighed as to any witness, you will give the testimony of that witness such credibility, if any, as you may think it deserves. And if you find that a witness has testified falsely in regard to any part of his testimony, you can, if you choose, disregard the whole of such witness' testimony.

You are here to determine the guilt or innocence of the accused from the evidence before you. You are not called upon to return a verdict as to the guilt or innocence of any other person or persons. So if the evidence convinces you beyond a reasonable doubt of the guilt of the accused, you should so find even though you may believe one or more other persons are also guilty.

On the other hand, if any reasonable doubt remains in your minds after impartial consideration of all the evidence, you should acquit the accused.

It is proper to add the caution that nothing said

in these instructions—nothing in any form of verdict prepared for your convenience—is to suggest or convey in any way or manner any intimation as to what verdict I think you should find. What the verdict shall be is the sole and exclusive duty and responsibility of the jury.

The punishment provided by law for the offense charged in the information is a matter exclusively within the province [575] of the court, and is not to be considered by the jury in arriving at an impartial verdict as to the guilt or innocence of the accused.

(Whereupon, at 2:35 o'clock p.m., Wednesday, March 8, 1950, the jury retired to deliberate.)

(At 3:40 o'clock p.m., Thursday, March 9, 1950, the jury returned to the box, at which time the following proceedings were had:)

The Court: Ladies and gentlemen of the jury, have you reached a verdict?

The Foreman: Yes, your Honor, we have.

The Court: Will you give it to the bailiff, please, and Mr. Clerk, you may read the verdict for each of the defendants. [576]

* * *

CONFERENCE ON INSTRUCTIONS
MARCH 3, 1950

Mr. Johnson: My point is that the word "take" is defined as meaning also "attempting." So it is if you attempt to hunt, kill or capture.

The Court: If the defendants came in and said they didn't shoot them, somebody else did, and then you could show they were out there with guns, and even though they didn't shoot, they attempted to shoot——

Mr. Johnson: I am not concerned with that. I am concerned with attempting to bait.

The Court: It doesn't say that.

Mr. Johnson: It defines that, and the regulation uses that, attempts to take birds by means of [19] grain.

* * *

The Court: Isn't one of the questions in this case whether or not ducks will eat lima beans?

Mr. Johnson: No, sir, I don't think it is. And I intend to argue that to the jury. I think the mere fact they don't eat the lima beans doesn't have anything to do with it.

The Court: You mean they can be lured by something they wouldn't eat?

Mr. Johnson: A duck does not know he is going to get a lima bean until he gets down and picks it up. How can a duck tell whether it is a lima bean? He has got to go down there. It lures him down there. The regulation does not require that the duck actually eat the material that is put out. It says

if it lures, attracts or entices them. If all of the ducks are lured down there and there is only enough feed for 10 out of a hundred, obviously all of them were lured, even though only 10 of them eat.

Mr. Irwin: No, you are confused. That statute is "lures by means of grain, wheat, or other feed." Now, if the jury chooses to take one line of testimony, that lima beans are not feed, then it can't be a lure. Let's go right back to the statute here.

Mr. Johnson: I certainly don't agree to that. If I see something that looks like a piece of cake and I go down to eat [22] it and find it is cardboard, I won't eat it.

The Court: But don't you think that under the statute they could make synthetic material that looks like corn or oats or barley and put them out, and it wouldn't be a lure?

Mr. Johnson: No, sir. It would be a lure. I am positive of that.

The Court: It says "feed," doesn't it?

Mr. Johnson: Anything that will tend to lure, entice, or attract, anything that will lure, entice, or attract.

The Court: Let's get back to your law and what it says.

Mr. Johnson: I think I get your point, and I think it is probably true that if it is plastic, it wouldn't hold, but suppose you put out garbage, as was suggested. That is a feed, because it would tend to lure. [23]

* * *

The Court: I don't see any attacks. I don't think I will give 15-A. How about 19-A? I don't

think there is any question about 19-A being the law.

Mr. Johnson: On line 8, again I neglected to put "grain or other feed." The same would go as to line 15, after the word "grain" put in "or other feed."

Mr. Irwin: Just a second, before we pass that by. As your Honor pointed out, you remember that Elder himself, Judge, on cross-examination, said it was not unlawful to feed.

The Court: But Elder doesn't make the law. This is a Ninth Circuit case.

Mr. Irwin: May I look at it again?

The Court: The case?

Mr. Irwin: Yes.

The Court: Here it is right here. There is no argument that 19-A is the law in this District.

Mr. Johnson: Yes. In another District, there is some doubt whether the first paragraph is the law. The second paragraph hasn't been passed on. [29]

Mr. Irwin: I see one distinction, Judge, in this case, and I think it is an important one in giving that. This situation is on a river bottom and we have testimony in here that the congregation of ducks was greatest away from these beans, and so on, and it was the fresh water that attracted the ducks, so there is——

The Court: You can argue that to the jury. I am going to give 19-A, because I think 19-A is the law.

Mr. Irwin: May I respectfully be understood to still object?

The Court: Yes, you can object. [30]

* * *

The Court: I see nothing wrong with No. 23. Now, on this question of entrapment, I don't think there is any evidence on entrapment.

Mr. Irwin: I have already done a lot of work on that question. I have considered it very carefully. I haven't cited all my law in this instruction, necessarily, but I have [33] got it here with me. Let's look at it this way, and then I will give you some of the other definitions which appear in the cases. We start out this way: As you Honor has pointed out, Elder was giving off with opinions, Macklin has given some opinions, Edgerton, and so on. Now, this case here is about a statute where the defendant personally was in a position to know what is meant. But here you have got a statute that doesn't say what is luring. It doesn't say what is baiting. So they write to Elder, "Can we please get together with you so we can find out what the score is?"

The Court: Supposing he says "No"? What is the entrapment?

Mr. Irwin: I am speaking of just the start, Judge. Then they call Maxwell. He calls Edgerton, and he says, "Edgerton, is there any change in the situation? What is the situation?" Edgerton says, "I know of no change." They discuss the 10 days' business.

Carty, at the Fish and Game Commission, asks the Attorney-General. Then they call Macklin and go down to see Macklin, to ask him what the situation is.

The evidence isn't quite fiinished, but we have

White coming up on Tuesday, Deputy Federal Game Warden, who went out there and talked with McCormick and told him it was all right. If you take all those things, and then read that Sorrell's case, which is the leading case on it, and then these [34] definitions, additional definitions of what constitutes entrapment, you will see what I am getting at.

The Court: I don't think, Mr. Irwin, that you can prove an entrapment unless you can prove someone has done something else. I don't think you can entrap by sitting still and doing nothing.

Mr. Irwin: How about this? Remember, we haven't heard White yet, and we have had Macklin. He has done something positive.

The Court: What did he do?

Mr. Irwin: He told Maxwell if it was substantially cleaned up, "It was all right." He is a Deputy Federal Game Warden.

The Court: Then the question is, was it substantially cleaned up? You can argue that to the jury. You can argue it was substantially cleaned up. He is relying upon the information given. Now, if they had gone out there and scattered some grain around themselves and then stood around and caught them, I would go along with you.

Mr. Irwin: You know, I think that is what happened. This is with due respect to you, but there was testimony of Elder about the fact that it looked like a man walked along with a bag with a hole in it, and when they distributed the grain 10 days previous, it was done with a spreader. Nobody walked along with any bag. But we can't prove that. [35]

Mr. Johnson: I entirely disagree with what you say, and I am not sure I would fight for your right to say it.

Mr. Irwin: Here is another thing, Judge. I think it goes along the line of these cases of speed traps. There is a line of decisions where you have a speed trap or entrapment.

The Court: You had something positive there. The officers went out and laid the trap.

Mr. Irwin: I am sorry to argue this so long.

The Court: You can argue to your heart's content.

Mr. Irwin: They asked an officer, "Say, will you please come out and look my place over and tell me are we all right, within the regulations?" That is the guy's job, to try and prevent crime, and he says, "I will let you know if it is not all right." Then they don't hear from him. The guys were down there and they don't tell him anything.

Mr. Johnson: May I say something there? Every one of the defendants so far has admitted he knew he could not shoot over baited territory, and even assuming you were correct, the question is whether on the day they were shooting, the 22nd of October, they were shooting over baited territory. Just because someone fails to come down and stop them from shooting doesn't save them. He knew he couldn't shoot and if he felt so strongly about it and was so concerned about it, he shouldn't have shot. He should have said, "Come down and tell me if I have got it cleaned up." [36]

Mr. Irwin: Before you rule, I would like to have you listen to White's testimony.

The Court: I am not going to agree to give or not to give these instructions. I am going to hold them in abeyance and wait until I hear all the rest of the evidence, but if the evidence does not go a whole lot further than it has gone, I won't give them. [37]

* * *

Mr. Irwin: I don't like to labor the question, but I feel very deeply on the situation. You come into a situation here where you go to an officer on a thing that is not clear and have him tell you a certain thing is all right, and he says, "Now, listen, I have told my boys to let me know on this thing if there is anything that isn't what it should be, and I have instructed them to get in touch with me." Can't you walk out of there——

The Court: That is not entrapment. I think they have [38] got to lay a trap. I am not going to refuse to give these instructions, but I am going to wait until the end of the case, and I am going to read these cases you cite. I may be able to convince myself they are good, but at the present time I don't just see them.

* * *

The Court: I don't think this case is going to the jury before Wednesday, anyway. You take these and read them and then give them to me, Mr. Johnson. I don't know everything about the law of entrapment, but before you can have an entrapment, you have got to show that somebody set a

trap. I don't think you can prove an entrapment by saying that somebody failed to do something, even though it is his duty.

Mr. Irwin: I think you will find, Judge, it doesn't have to be that strong. A representation or a subterfuge is sufficient. They don't have to go out and just absolutely lay a trap.

The Court: I think these officials are really going a [39] little bit further than the law says by saying if the grain was substantially cleaned up, because I think the cases definitely say if there is any grain there at all. [40]

* * *

March 8, 1950

Mr. Irwin: You have been very patient on this entrapment. In addition to Jack White's testimony, I notice this, which I think is very persuasive. In Government's Exhibit M, it was stipulated that these are the government regulations that were handed out. Will you look at this note here?

The Court: That's all right.

Mr. Irwin: The government tells them to go and see the State Board.

The Court: If the government told you to go ahead and told you to shoot and stood there and watched you shoot, knowing grain was there, maybe you would have something.

Mr. Irwin: But Jack White was a Deputy Federal Warden.

Mr. Johnson: You have got to have something more than a neglect of duty.

Mr. Irwin: That is a positive statement. The

man was acting as a Deputy Federal Game Warden on that date.

The Court: I don't know whether he was acting as a Federal Game Warden or County Game Warden.

Mr. Irwin: I may be in error on that, but on that date he was a County and State and Deputy Federal Game Warden. [43]

* * *

Mr. Irwin: On the formality that has been practiced when submitting proposed instructions, not to number them, I numbered none of them, but I think, also, from the standpoint of the record, I am required at the conclusion of your Honor's instructions, to object. Will you give the entrapment instruction a number now that there has been a ruling.

Mr. Johnson: You can object to all the instructions given.

Mr. Irwin: I don't do that. The only exception I have is on the entrapment. We have settled all the others.

The Court: Supposing you number that A then, Defendants' A, and you can object.

Mr. Irwin: I will just do that. [45]

Los Angeles, California, March 9, 1950,
2:35 o'Clock, p.m.

(The following portion of the transcript was omitted at page 576, line 4, of volume 3:)

Mr. Irwin: May it please your Honor, I wish again to object to your failure to give defendants' suggested instruction number A.

(Whereupon, at 2:35 o'clock, p.m., Wednesday, March 8, 1950, the jury retired to deliberate, and returned to the court room at 9:10 o'clock, p.m., when the following proceedings were had:)

The Court: Is it stipulated the jury is present and in the box?

Mr. Irwin: Yes.

Mr. Johnson: Yes, your Honor.

The Court: Ladies and gentlemen, have you selected a foreman?

The Foreman: Yes.

The Court: Have you been able to reach a verdict?

The Foreman: No, sir.

The Court: Do you feel there is any possibility of reaching a verdict?

The Foreman: It doesn't seem that way. Not tonight, anyway.

The Court: I would like to call your attention to the [46] fact that we have spent six days on the trial of this case. It has cost the government a large sum of money to try the case. It is very desirable, if you can do so, to reach a verdict. However, I do not wish any of you in any way to give up your honest convictions. Whether you feel that the defendants are guilty or innocent, you should hold to those convictions unless in further deliberations you can reach a verdict. I wish you would return to the jury room and continue your deliberations in the hope that you can come to some conclusion in this case. If you are not able to reach

a verdict by 10:30, why, then, we will consider what disposition we will make of you in regard to the case.

Will you continue your deliberations, consulting with each other, without giving up any of your honest opinions, and see whether or not it is possible for you to reach a verdict in this case. You may retire to the jury room.

(Whereupon, at 9:15 o'clock p.m., Wednesday, March 8, 1950, the jury retired to deliberate, and returned to the court room at 10:40 o'clock p.m., when the following proceedings were had:)

The Court: Is it stipulated the jury is present and in the box?

Mr. Irwin: So stipulated, your Honor.

Mr. Johnson: So stipulated.

The Court: Ladies and gentlemen, I assume you have not [47] been able to reach a verdict.

The Foreman: We have not.

The Court: Do you feel if I would allow you to go back into the jury room and deliberate, you could reach a verdict within the next 25 or 30 minutes?

The Foreman: I don't think so.

The Court: As I said to you before, and I will say again now, this is a rather important case. We have spent six days in its trial. We have had a number of witnesses here. There is considerable interest in the outcome of the case. I don't think the court is justified at this time in discharging you, so I have made arrangements for you to spend the

night at a hotel, and tomorrow morning you can come back here after you have had your breakfast and deliberate some more, and ascertain whether or not you can determine whether the defendants are innocent or guilty. If any of you wish to notify any of your families, if you will give the telephone numbers to the bailiff, why, he will call your families and tell them that you are unavoidably detained for the night.

Mr. Irwin: May we approach the bench?

The Court: Yes.

(The following proceedings were had at the bench, outside the hearing of the jury:)

Mr. Irwin: Just for the record, as we said in chambers, I feel in the light of the last statement of the Foreman, I [48] should move for a mistrial and that the jury be discharged.

The Court: If you make the motion, the motion is denied.

Mr. Irwin: That is what I understand.

(The following proceedings were had in open court in the hearing and presence of the jury:)

The Court: You may now retire and we will stand in recess until 10:00 o'clock tomorrow morning.

(At 3:00 o'clock p.m., Thursday, March 9, 1950, the jury returned to the box, at which time the following proceedings were had:)

The Court: Is it stipulated the jury is present and in the box?

Mr. Irwin: So stipulated, your Honor.

Mr. Johnson: So stipulated.

The Court: Ladies and gentlemen of the jury, have you arrived at a verdict?

The Foreman: Your Honor, we have not.

The Court: Do you feel that there is any use of further deliberations?

The Foreman: I don't know what to say, your Honor.

The Court: Well, if you could arrive at a verdict, it is important that you do so. However, I don't want any one member of the jury panel to give up his or her own honest [49] convictions. You have been in session now for approximately 24 hours. It would seem to me if you are able to arrive at a verdict, you would have done so. You are the foreman of the jury. You are the spokesman of the jury. Would you request that you have further opportunity to deliberate on this case?

The Foreman: I would, your Honor, ask another hour?

The Court: Another hour?

The Formean: Yes.

The Court: You may retire to the jury room and continue your deliberations. At the end of an hour, we will call you back down to court and determine as to what the situation is.

(Whereupon, at 3:05 o'clock p.m., Thursday, March 9, 1950, the jury retired to deliberate further, and at 3:40 o'clock p.m., returned to the box, at which time the proceedings were

had as indicated on page 576 of the transcript, line 9.) [50]

Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 29th day of May, A.D. 1950.

/s/ S. J. TRAINOR,
Official Reporter.

[Endorsed]: Filed June 20, 1950. [51]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 96, inclusive, contain the original Information; Verdicts; Instructions Given; Instructions Refused; Notice of Motion and Motion for New Trial; Stipulation and Order re Motion

for New Trial; Judgments; Notice of Appeal; Stay of Execution; Stipulation and Order Extending Time to Docket Appeal and Designation of Record on Appeal and full, true and correct copies of Minute Orders Entered February 28, 1950, March 2, 1950, March 9, 1950, and March 20, 1950, which, together with copy of reporter's transcript of Proceedings on February 28, 1950, March 1, 1950, March 2, 1950, March 3, 1950, March 7, 8 and 9, 1950, in four volumes and original plaintiff's exhibits Nos. 1 to 15, inclusive, and original Defendants' Exhibits A to N, inclusive, transmitted herewith, constitute the record on appeals to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to $4.00 which sum has been paid to me by appellants.

Witness my hand and the seal of said District Court this 23rd day of June, A.D. 1950.

EDMUND L. SMITH,
Clerk.

[Seal]: /s/ THEODORE HOCKE,
Chief Deputy. [52]

In the United States Court of Appeals
for the Ninth Circuit

No. 12590

UNITED STATES OF AMERICA,

Plaintiff,

vs.

EDWIN L. CARTY, et al.,

Defendants.

STATEMENT OF POINTS ON WHICH APPELLANTS INTEND TO RELY ON APPEAL

I.

The Court erred in its rulings on the admission of testimony and exhibits.

II.

The Court erred in its instructions to the jury.

III.

The Court erred in failing to give instructions to the jury requested by the defendants.

IV.

The Court erred in not granting the motion of the defendants for a mistrial during the course of the deliberations of the jury.

V.

The Court erred in denying defendants' Motion for a New Trial.

VI.

The Court erred in imposing judgment and sentence.

OTTO CHRISTENSEN and
JOHN J. IRWIN,
By /s/ OTTO CHRISTENSEN,
Attorneys for Defendants.

[Endorsed]: Filed July 6, 1950.

[Endorsed]: No. 12590. United States Court of Appeals for the Ninth Circuit. Edwin L. Carty, H. McCormick, Eugene Doud, James R. Doud, Vincent Doud, Raymond E. Farrell, James D. McCormick, Robert Maulhardt and Edward C. Maxwell, Appellents, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed June 26, 1950.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for The Ninth Circuit.

No. 12590.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

EDWIN L. CARTY, H. McCORMICK, EUGENE DOUD, JAMES R. DOUD, VINCENT DOUD, RAYMOND E. FARRELL, JAMES D. McCORMICK, ROBERT MAULHARDT and EDWARD C. MAXWELL,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLANTS.

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No. 12590.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

EDWIN L. CARTY, H. MCCORMICK, EUGENE DOUD, JAMES R. DOUD, VINCENT DOUD, RAYMOND E. FARRELL, JAMES D. MCCORMICK, ROBERT MAULHARDT and EDWARD C. MAXWELL,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLANTS.

Statement of Basis of Jurisdiction.

This is an appeal from a judgment rendered against the appellants by the District Court of the United States for the Southern District of California, Central Division, upon a verdict finding appellants guilty of violation of the Migratory Bird Treaty Act (U. S. C., Title 16, Sec. 703, *et seq.*) and the regulations relating thereto. Charges contained in the information for alleged violation occurred on or about October 22, 1949. [Information, R. 2; Verdicts, R. 9-13; Judgments, R. 52-63.] A fine of $500.00 was imposed against each appellant. [R. 52-63.]

The District Court allegedly had jurisdiction under 22 U. S. C., Sec. 41(2), and this Court has jurisdiction under 28 U. S. C., Sec. 225(a).

Thereafter the appellants duly filed Notice of Appeal from said judgments within the time prescribed by law. [R. 64.] Then, contemporaneously therewith, the appellants filed their Designation of Grounds on Appeal. [R. 65.]

Thereafter, appellants filed within the time prescribed by law their Designation of Record on Appeal [R. 69], and a Statement of Points on Which Appellants will Rely on Appeal, together with a Designation of the Parts of the Record necessary for a consideration of their appeal. [R. 69, 477.]

Thereafter, the record in this case, including the transcript of all of the testimony and evidence, together with all of the exhibits, separately and directly certified, were filed with the Clerk of this Honorable Court, together with a statement of points to be relied upon on appeal. [R. 477-478.]

Statement of the Case.

The Information.

> "The United States Attorney charges: That on or about October 22, 1949, in Ventura County, California, . . . the defendants . . . without being permitted so to do by any regulation made, adopted, and approved under authority of the Migratory Bird Treaty Act of July 3, 1918, as amended, did take, hunt and kill, migratory waterfowl and migratory game birds over baited ponds and areas, by means, aid and use of shelled grain, namely, barley and cracked lima beans, which said grain and beans

had been deposited, distributed and scattered over said ponds and areas so as to constitute a lure, attraction and enticement to said migratory game birds; contrary to the provisions of the Migratory Bird Treaty Act and the Regulations relating thereto, as duly proclaimed pursuant to law (Regulations relating to migratory birds, approved and proclaimed by the President on July 29, 1948, 13 F. R. 4411, as last amended July 29, 1949, (2) 14 F. R. 4798, Part 1, Chapter 1, Subchapter B, Title 50, Code of Federal Regulations)."

Pertinent Facts in Evidence.

The appellants consist of farmers, businessmen and public officials who had either been born or resided for many years in and about the City of Oxnard, Ventura County, California. The appellant, Maxwell, an attorney, had been United States Commissioner for the District, President of the County Bar Association of Ventura County, and had served on the Draft Board. The appellant, Carty, at the time of the trial, was Mayor of the City of Oxnard, which position he had held for six years. He was Past President of the League of California Cities and of the National Association of Municipal Legislators, and had an interest in conservation work for 30 years, having been president of many sportsmen's clubs, Ventura County Gun and Rod Club, the Southern Council of Wardens, Southern California Sportsmen, and State Sportsmen's Council. In addition, at the time of his trial he was a member of the California Fish and Game Commission, and was such a Commissioner on appointment of two governors. There was uncontradicted evidence of the excellent and good character of the appellants. [R. 265, 344, 451.]

The appellants were all members of the Santa Clara Gun Club where the alleged violations were said to have occurred. The Club consisted of about nine members. [R. 265.] A small acreage was used during the duck season, but this was otherwise a part of a large ranch and out of season was operated by this ranch. The appellants, Maxwell, Carty and James McCormick, were the only defendants who testified, it being stipulated that the testimony of the remaining appellants would be cumulative. [R. 265, 266, 344, 394, 429.]

In season the Club occupied an area of approximately 40 acres, situated in the middle of a section known as the McGrath Ranch that contained a series of dikes, which could be converted into ponds by the introduction of irrigation water. Forty-one sacks of grain were distributed on the grounds of the Club prior to the opening of the 1949 duck season, each sack consisting of 90 pounds, or in all approximately 1¾ tons. [R. 394-395.] Seventy-five per cent of this only was grain and the balance was chaff, radish seed and other foreign matter; or, an approximate scattering of grain of 1⅜ tons. [R. 398.] The last of the grain was distributed on the morning of October 13, 1949. The shooting season opened at noon on October 21, 1949. [R. 401.]

Previously, on October 8, 1949, 36 sacks of dried lima beans weighing about 100 pounds to the sack was put out on the southwest corner of the Club. The appellants James McCormick and H. McCormick, operated the farm in the middle of which the Gun Club was situated and also the land of the Gun Club out of season. They were under contract with the sub-lessee, a pimiento raiser, to protect his crop from mudhens which were very destructive to pimientos; in the hope of keeping the mud-

hens out of the pimientos at the distant southwest corner, in advance of the distribution of the grain for pre-season duck feeding, they put out the lima beans. [R. 405, 406.] The lima beans were not put out as duck feed, as it had been the previous experience that ducks would not eat lima beans. [R. 405.] The record discloses only slight difference of opinion as to lima beans not constituting duck feed, the great weight of the testimony being that it did not. [R. 312, 326, 332, 337, 344, 351, 389, 392, 408, 418, 422, 256, 259, 264, 279, 283.] There was some testimony that it did under exceptional circumstances and if the ducks were very hungry. [R. 126, 209, 213, 332.]

The testimony discloses that the authorities advised the appellants that the distribution of feed for ducks should be made not later than from 3 to 10 days prior to the opening of the shooting season. [R. 240, 418, 419, 427.] The appellant, James McCormick, in distributing the 41 sacks of grain, had used a broadcaster rather than spreading it directly from the sacks so as to stretch the cleanup of the small quantity of grain spread. The evidence of the government discloses that a duck will eat a half pound of grain per day [R. 341]; that at noon, on October 21, there were 15,000 ducks on the club property. [R. 245.] There was expert evidence of the defense that 9 sacks of grain was eaten in 22 minutes by an estimated 10,000 ducks. [R. 392.] There was evidence from a warden that there were several thousand ducks there on October 18. [R. 400.] Two or three thousand ducks would clean up the actual net 1⅜ tons of grain within two days. [R. 401.] The ducks taken were less than the limit and aggregated in all thirty-seven. [R. 207, 214.]

On the 14th day of October, when McCormick observed that the ducks in number had not increased, he went to

Ojai and talked to Mr. Getman, who was a game warden [R. 315], about the poor flight of ducks, and expressed doubt that the feed would be cleaned up before the opening of the shooting season; game warden Getman stated he would check into the matter and let him know. [R. 399-400.] Getman testified that Mr. McCormick had visited him at appellant Carty's suggestion. [R. 316.] Getman also testified that his diary disclosed that he had a talk with McCormick on October 14, and that it included a talk with Game Warden John Spicer on the 15th day of October, at which time Mr. Getman told Mr. Spicer exactly what Mr. McCormick had told him. [R. 316-317.]

In the afternoon of October 18 or October 19, together with appellant Vincent Doud, they (McCormick and Doud) noticed a Fish and Game car around the Club property driving along slowly on the road just above the Club, and they waved to him, and he waved back but speeded up and drove off. That since the game warden didn't stop, McCormick concluded that he had checked the Club and that everything was all right. [R. 403.]

James McCormick met Mr. Jack White, Ventura County Game Warden and Deputy State and Federal Warden, October 18, three days prior to the opening of the shooting season and inspected the Club property thoroughly. After this inspection, White said: "Jim, you needn't worry; the ducks will have it cleaned up. You now have two or three thousand ducks here and I am sure it will be all right." [R. 400.]

Game Warden White testified that his diary reflected that on the 18th of October, at 10 o'clock in the morning, he met appellants James McCormick and Maxwell, and at Maxwell's request went with said appellant McCor-

mick and made an inspection of the Club's premises and found some beans around the road and a little scattered barley, and that he told said appellant McCormick that it appeared from the number of birds present that it would be cleaned up and that he didn't think there was anything to worry about and saw no reason why they shouldn't go ahead and shoot. [R. 417.] Warden White made a second inspection on October 20 and his diary reflected "had a little feed still out and some beans the ducks won't eat. Feed had been out for some time." [R. 417-418.]

Joe Paul, County Editor of the Ventura Star Free Press, testified that following the alleged violations he had a talk with Warden Elder on October 24, 1949, and the Club "had been more or less under observation for some time . . . they had been watching the club." [R. 414.]

Deputy Warden Jack Bedwell [R. 71] stated that he was at the Club a couple of hours before the season opened at noon October 21 [R. 115], and that he used binoculars in observing what transpired on the Club's property [R. 74]; that as a result of the comment of a hunter on the Club's premises that afternoon "that there had been a few lima beans left on the road," he revisited the Club's premises about six o'clock that evening, together with Warden John Spicer. [R. 474-475.] That the hunter who told him that there were a few lima beans left on the road was appellant James McCormick. [R. 75.] Appellant James McCormick testified that after he came in from the blinds after the shooting season opened on October 21 he saw Warden Bedwell, together with a guest, and appellant Vincent Doud. [R. 401.] That he and Bedwell were at a distance of about 60 to 70 yards from

the beans and they could easily be seen, and that as they talked together he pointed to them; that he told Bedwell that the lima beans had been put out there and suggested that he cover them up, and that Bedwell replied "I think that would be a good idea." [R. 401-402.] The ducks were not eating any of those lima beans. [R. 403.]

Strange that lima beans, which even Bedwell doesn't consider normal duck feed [R. 126], should inspire the evening Spicer-Bedwell inspection, and also stranger, for McCormick to mention them and thereby invite investigation of the premises if the premises were baited with grain. Apparently he had no guilty conscience on the subject of the existence of grain on the premises in an amount that would constitute bait under the law.

McCormick further testified that upon appellant Maxwell's return the night of the 20th of October he was told by Maxwell that Macklin, the supervisor of all game wardens in Southern California, stated that if the barley was substantially cleaned up it was all right to go ahead and shoot; that he notified Eugene Doud, president of the Club, to advise the members of the Club that everything was all right and to go ahead and shoot. [R. 404.]

Warden Jack Bedwell testified that when as a result of this conversation with McCormick he visited the premises of the Club with Warden Spicer the evening of October 21st, they with the aid of flash-lights moved about the premises of the Club and found some barley grain which appeared to have been scattered and in some areas was thick enough "to scoop it up with our hands." [R. 76.] Warden Spicer, of this nocturnal flash-light inspection, testified that Bedwell had informed him that he had seen quite a large quantity of feed on the premises of the Club. [R. 149.] That he proceeded with Bedwell to

the Club and wherever he flashed his light he saw barley grain on the ground. [R. 149-150.] Agents Bedwell and Spicer and Elder testified to having seen barley grain at various points on the premises as well as the lima beans on the southwest corner of the property, as described by appellant James McCormick.

The existence of barley grain on the dikes, the ponds and the premises of the Club as of the time of the alleged violation October 22, 1949, and immediately prior to the opening of the season at noon on October 21, in quantities to constitute a violation by shooting over baited ponds as alleged in the information, was sharply controverted by defense witnesses, the testimony being to seeing insubstantial quantities, to none at all; also the government's witnesses were in conflict with each other and even themselves. Even the government witnesses had the quantity as low as 3 or 4 buckets. [R. 411, 189, 344, 361, 288, 289, 341, 392.]

Game Warden Elder testified that after being phoned by Game Warden Spicer concerning his visit to the Club premises on the evening of October 21 with Game Warden Bedwell he went out on an expedition of his own at one o'clock on the morning of October 22. Elder said that he received his information from Spicer about 8:30 on the evening of October 21. [R. 178.]

Game Warden Welsh testified that on October 21 he was working the northern part of Kern County and the south part of Tulare County with agent Elder. Approximately at noon on October 21 (which would be before the opening of the season and before Bedwell could have communicated with them) Elder told him "he had a report that there had been some feeding of ducks on the Club of which Mr. Carty was a member." [R. 311.]

Also that Elder told him that "he didn't believe beans constituted a bad factor in baiting of ducks." [R. 312.]

Another Game Warden, Les Arnold, at whose house Warden Spicer phoned Elder, testified that after the call Elder said, "that Spicer, the boys had found some grain on the Carty club." [R. 343.] Further, he testified that he saw Warden Elder on Sunday, October 23, the day after the alleged violations, and that he asked him what he did over there, and that Elder said,

> " 'Well, they pinched the Carty club.' He then said, 'How much grain did you find?' He said, 'Oh, three or four bucketsful and a lot of beans.' Then he said 'Well, I am not so excited over the beans, as I don't figure these ducks will eat beans.' " [R. 343-344.]

Earl Macklin, Chief Warden in charge in the Southern California area [R. 319] testified that appellant Maxwell consulted him on October 19, 1949, two days before the opening of the season. [R. 321.] That Maxwell stated that he had informed Game Warden Edgerton that the Club had not put out any feed subsequent to October 13. [R. 323.] That Maxwell said that state wardens (also deputized as Federal Wardens) in that area, particularly Spicer, had been unfriendly, and that Spicer harbored some resentment against club members because certain members of the Club had taken part in retaining Mr. White on his job as Ventura County Game Warden. [R. 324.] Macklin told Mr. Maxwell that he would instruct Spicer to contact him whenever anything came up in the area which involved enforcement against clubs in the area. That he told Mr. Maxwell that Game Wardens and Captains were instructed not to make technical arrests; that if the Club was reasonably cleaned up that there wouldn't be any ar-

rests made. That the day following Mr. Maxwell's visit he had a talk with Spicer concerning Maxwell's visit and talk; that Spicer at that time said that he had not inspected the clubs in the area as to the amount of feed that might be remaining; that he told Spicer that "he might the next morning make a round of the clubs or check with the other wardens in the area to find out if they had inspected the clubs"; that he told Spicer to contact him if he found anything that involved the clubs; that Spicer did not report back to him after the 20th until the 26th of October. [R. 326-327.] That he had a conversation with Warden Elder [R. 325] concerning events that took place on the 22nd, and that Elder agreed that beans were a very poor feed for ducks. [R. 326.]

Game Warden White told Maxwell on the 18th of October that he had checked the Club and considering the ducks that were there and the amount of feed that remained, "It should be sufficiently cleaned up." [R. 299.] Appellant Maxwell stated that prior to the morning of October 22, 1949, he had not been on the club premises since summer. [R. 277.] That it was pitch dark when he went to the shooting blind. [R. 285.] After he and appellant Doud had shot their limit of ducks (five each) [R. 285] they left their blind from which they were shooting and proceeded only a short distance when accosted by Game Warden Spicer and Game Warden Elder [R. 287] who said, they were under arrest for shooting over-baited ponds. Elder said at that time he could pick up hands full of grain on the marsh and that he could go around and scoop up three or four boxes full. Maxwell responded that it would take very little time for the ducks to pick up a few bucketsful of grain and "You know I am beginning to get an inkling of this case. This case has a rotten smell to me." [R. 289.]

Maxwell said he had just come in from the blind and had not seen any grain. [R. 189.]

About three weeks before the opening of the season Maxwell had conversed with Warden Edgerton regarding regulations. [R. 267.] Edgerton said that they had advised certain clubs to stop feeding ten days before the season, and that he knew of no change that feeding would be permitted up to 72 hours before shooting, but that he would consult with his superior Mr. Macklin. [R. 267-268.] Maxwell did not hear from Edgerton after that. [R. 272.] Not hearing from Edgerton, Maxwell contacted Warden White on the 17th day of October, 1949 [R. 273], and at his insistence Warden White inspected the Club and reported back that he felt that the amount of feed on the Club was not unreasonable and in his opinion would be cleaned up before the shooting season started.

All game wardens are required to keep a diary and make written reports to Mr. Macklin. [R. 320.] Warden Spicer testified that he had not been to the Club for a week prior to the opening of the season, October 21. [R. 164.] Spicer's weekly reports taken from his diary under date of October 16 read, "With Palmer U. S. F. S. to Santa Clara riverbottom, gun clubs." He identified the club in question as being in the Santa Clara river bottom. [R. 444.] Warden Getman testified that on the 15th day of October he had notified Spicer of his conversation with McCormick with respect to inspecting the Club. [R. 317.] Spicer denies having a conversation with Warden Getman. [R. 444, 165.] The entry on October 21, in his diary and report reads, "To Santa Clara riverbottom and gun clubs checking hunters." [R. 442.]

Spicer testified he talked with Warden White at 9 o'clock in the morning on October 21, 1949, who informed

him that he had checked all the clubs, and that he didn't see any reason why they couldn't go ahead and shoot. [R. 175-176.] Yet Spicer didn't see any necessity of notifying the club or its members of the apparent violation of baiting regulations following his inspection of the premises on the night of October 21. [R. 176.]

Warden Spicer testified that it was customary for all clubs to put out feed some time prior to the opening of the season. [R. 174.] Warden Elder testified "there is nothing illegal about feeding before the shooting season, * * * ." [R. 210], that "it was not a matter of the length of time the feed had been out before the ducks were hunted, it was the fact that the grain was there at the time the hunting took place * * *." [R. 186.]

Warden Edgerton told appellant Maxwell that feeding within 10 days before opening of season had been mutually agreed upon as proper practice, as feed should be eaten up by the opening day of shooting season; that this time for feeding had been agreed upon by Wardens Spicer, Muldoon, White and himself; that the clubs were so advised by them. [R. 240, 242.]

Warden Bedwell, who was on the premises shortly after noon of the 21st and to whom appellant McCormick gave the information about the lima beans, states that he had a conversation with appellant Carty on October 21st, which "consisted of asking of Mr. Carty if he had gotten his limit of ducks, and he said that he had, and he asked me if I brought my shotgun along and invited me to hunt on the club." [R. 118.] If there had been bait on the premises Mr. Carty obviously wouldn't invite its disclosure.

Bedwell testified that his inspection of the premises on the evening of the 21st was "possibly . . . 45 minutes."

[R. 141.] That it was the remark of Mr. McCormick regarding the lima beans that caused him to contact Warden Spicer. [R. 125.] The game wardens then met at 7 o'clock on the morning of October 22 and pursuant to a prearranged signal, surrounded the Club, observed the shooting from blinds with the use of binoculars, and then moved in and made arrests of all present. [R. 77, 83.] That he understood that the Club had been under observation by Agent Elder. [R. 254.]

Warden Spicer's superior, Mr. Macklin, interviewed him on October 26 with reference to the conditions of the Club which led to the arrests; Macklin testified that he talked to Spicer at that time regarding how much feed was on the Club, and that Spicer was rather indefinite about the amount of feed. [R. 327-328.] That he told Spicer that he was preparing a report for the San Francisco office and would like him to make an estimate. Whereupon Spicer replied, "Well, I don't know how much was on there, what did Elder say." [R. 328.] Spicer said he didn't think there was as much as Elder estimated, and when asked if there was a ton, he replied, "Well, somewhere between a ton and two tons." [R. 328.]

Exhibit "M" [R. 364], Government Regulations, which were handed out to the public and the appellants, and which was the subject of discussion between appellant Maxwell and Warden Macklin [R. 267] contained instructions to consult with "appropriate State officers" regarding its provisions. Both Federal Deputies, White and Edgerton, as well as the Supervisor Warden Macklin, had informed appellants that feed was permissible variously from approximately ten days to three days before the shooting season. [R. 240, 418, 427.] The only grain that was distributed on the premises of the Club was approximately

ten days before the season with a mechanical spreader [R. 395-396]; the lima beans were put out earlier.

Elder, who inspected the premises a few hours following the inspection on the evening of October 21 by Wardens Spicer and Bedwell, testified that after he had passed cross-dike No. 5, on middle dike, there was barley "in very heavy dribbles where it appeared to me a sack had been carried over someone's shoulder, allowing barley to leak out where it was carried, with here and there a little pile or so, approximately—I estimated at the time five or 10 pounds in each pile. . . . I found grain in the water. It looked like more than two sacks had been dumped in one place . . . on the south dike near No. 4." [R. 180-181.] The grain put out by the Club was broadcast by a mechanical spreader. [R. 395.]

The ducks confiscated were placed in the evidence locker of the Los Angeles cold storage plant and were there at the time of the trial; they were not offered in evidence or was there testimony concerning the contents of their craws. [R. 208.]

Elder testified that all of the wardens watched with field glasses on the early morning of October 22 the operations of the Club. [R. 183.] That they had an agreed plan of action. [R. 184.] That he talked with appellant Maxwell at the time of his arrest. [R. 188.] That Maxwell said he smelled something rotten in the whole deal and looked at Mr. Doud and said "Jack White." Whereupon, Elder "expressed to him Jack White hadn't anything to do with the matter," and that he had inspected the ponds during the night and had found "more grain than there should have been there," to which Maxwell replied, "I just came in from my blind and have not seen a bit of grain." Elder

then said, "I could have scooped three or four or more bucketsful of samples from places," and to this Maxwell replied, "That couldn't have been, because they had stopped feeding at least 10 days before." [R. 188-189.]

The Issues as Submitted to the Jury by the Court.

The Court in its instructions read the regulation proclaimed on July 29, 1948, which is as follows:

> " 'Waterfowl (except for propagating, scientific, or other purposes under permit issued pursuant to Section 6.8), and mourning doves and white-winged doves are not permitted to be *taken,* directly or indirectly, by means, aid, or use of shelled, shucked corn, or of wheat or other grain, salt, or other feed that has been so deposited, distributed, or scattered as to constitute for such birds a lure, attraction, or enticement to, on, or over the area where hunters are attempting to take them: Provided, however, such birds may be taken over properly shocked corn and standing crops of corn, wheat, or other grain or feed, and grains found scattered solely as a result of agricultural harvesting.'
>
> "Thus, this regulation which I have just read to you has the effect of law, since it was propounded under the authority of the Migratory Bird Act of 1918, as amended." [R. 454-455.]

The Court (over objection [R. 464]) then gave Government Instruction No. 19-A [R. 26, 457]:

> "You are instructed that the regulations concerning the baiting of migratory birds is violated whether the hunters had pursued the indirect method of baiting before the season opened so as to keep the birds in the hunting area to be shot after the season opens, whereupon the hunters may flush them as they walk

or punt over the preserves, or by directly placing the grain or other feeds in front of the blinds or stands during the season.

"Furthermore, concerning the provisions in the regulation that migratory birds are not permitted to be taken 'directly or indirectly' by means of bait, you are instructed that the word 'indirectly' equally applies to any luring of the birds by grain or other feed to the hunting area, regardless of whether the grain or other feeds is spread before the bird blinds themselves or is more widely scattered." [R. 457-458.]

The Court Failed to Submit the Issue of Entrapment to the Jury.

The Court refused to give any instructions whatever on the subject of entrapment. The defendants requested the following instructions on the subject:

"The defendants in this case have raised the defense of entrapment. You are instructed that the first duties of the officers of the law are to prevent, not to punish, crime. It is not their duty to incite to and create crime for the sole purpose of prosecuting and punishing it. When the criminal design originates, not with the accused, but is conceived in the minds of the government officers, and the accused is by persuasion, deceitful representation, or inducement lured into the commission of a criminal act, the government is estopped by sound public policy from prosecution therefor. (Case cited.)

"Entrapment is the conception and planning of an offense by an officer, and his procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion, or fraud of the officer. (Case cited.)

"There is common agreement that where a law officer envisages a crime, plans it, and activates its commission by one not theretofore intending its perpetration, for the sole purpose of obtaining a victim through indictment, conviction and sentence, the consummation of so revolting a plan ought not to be permitted by any self-respecting tribunal. (Case cited.)

"You are, therefore, instructed that if you have first concluded beyond a reasonable doubt that the defendants have committed the acts alleged in the information, that having so concluded, you are further satisfied that prior to their commission the defendants never conceived any intention of committing these offenses, or any similar offense, but that the officers of the government incited and by suasion and representations lured them to commit the offenses alleged in order to entrap, arrest, and prosecute the defendants therefor, then these facts are fatal to the prosecution of these offenses, and the defendants, and each of them, are entitled to a verdict of not guilty." [R. 31, 33.]

"The defendants have raised the defense of entrapment. The natural and logical approach to this subject of entrapment must be through the application of the doctrine of estoppel. Individuals, in dealing with each other, are not permitted to assert rights or enforce remedies when their own acts induced another to commit the wrong out of which arose the right sought to be enforced. Estoppel is founded on morality and justice, and especially concerns conscience and equity. Although the government is a sovereign, it is not permitted to adopt means which are condemned by the courts when practiced by its citizens. If the conduct of government agents be unconscionable, if it be intentionally deceptive and de-

signed to induce, and does induce another to do something which he would not have otherwise done, the wrongdoer is not, and should not be, permitted to profit thereby. Sound public policy estops the government from asserting that an act which involves no criminal intent was voluntarily done when it originated in and was caused by the government agents' deception. (Case cited.)

"If you find, therefore, that the government agents, by their conduct, as appears from the evidence in this case, caused the defendants to do the acts complained of and which from the evidence it appears they would not have otherwise done except for such conduct, then you are instructed that defendants are entitled to a verdict of not guilty. (Case cited.)" [R. 37-38.]

The appellants objected and excepted to the Court's failure to instruct on the issue of entrapment. [R. 465, 468, 470.]

Specifications of Error Upon Which Appellants Will Rely.

ERROR I:

The Court erred in failing to submit the issue of entrapment to the jury and in refusing to give to the jury appellants' requested instructions, or any of them, on the issue of entrapment, which said instructions are set forth, *supra,* at pages 17-19 of this Brief.

ERROR II:

The Court erred in giving Government Instruction No. 19-A, which is set forth, *supra,* at pages 16-17 of this Brief.

ARGUMENT.

I.

Under the State of the Evidence the Trial Court Should Have Submitted the Issue of Entrapment to the Jury Under the Proper and Applicable Instructions Requested by the Appellants.

It is our contention that the Court erred in failing to give any instruction on entrapment whatsoever, either on its own motion, or as requested by the appellants. Such an instruction was required under the state of the evidence on two aspects of the case: (1) The evidence of inducement to put out pre-season feed for the ducks, in the light of the Court's instruction that the regulation was violated by feeding before the season opened "so as to keep the birds in the hunting area to be shot after the season opens," and (2) evidence of enticement and inducement to shoot after the season opened over alleged baited ponds.

A summarization of the following facts established alone, required the giving of a proper instruction on entrapment:

1. The appellants were highly respected, law-abiding citizens of good character.

2. That no intent existed or was conceived in the minds of any of them to violate the law, but on the contrary they scrupulously and meticulously sought the counsel of authorities in respect to their every act relating to their small Gun Club; they were told that it was permissible to put out feed for ducks variously from three days to ten days in advance of the opening of the season. They were told that this was what the various agents involved in the ar-

rests had agreed upon as a proper practice; they were told there was nothing illegal about feeding before the shooting season; they were told "it was not a matter of the length of time the feed had been out before the ducks were hunted," but that violation would only result from "the fact that the grain was there at the time the hunting took place."

3. The Government regulations themselves, "Exhibit M," which the appellants possessed, advised them to consult with appropriate State officers regarding its provisions. Although the Deputy Wardens were, with the exception of Elder, State and County Wardens, they were also deputized as Federal Game Wardens.

4. The only grain distributed on the premises of the Club was a small amount approximately ten days before the season opened, and was put on with a mechanical spreader, pursuant to the advice of these Game Wardens that it was permissible to put out pre-season feed.

5. That a duck will eat a half pound of grain per day and that there were ducks present in such number as to have consumed all the grain that had been put out prior to the opening of the season; also there was substantial evidence that all of the grain had been consumed prior to October 22.

6. Although the grain was distributed by means of a mechanical spreader, twelve days later, on October 22, Warden Elder on his late evening or early morning inspection found piles of five or ten pounds of grain—"that it was in heavy dribbles and appeared as if the grain had been allowed to leak out where it was carried," and also that he found grain in the water; Wardens Spicer and Bedwell had covered the grounds on an inspection tour

a few hours before Elder's inspection. There was evidence of spleen and bitterness between Warden Spicer and some of the appellants. The evidence of the defense was that there were no piles or heavy dribbles of grain and that the only grain that they had put out had been broadcast with a mechanical spreader. Also Warden Arnold's testimony that Warden Elder told him that all he found on the Club's premises was a few buckets of grain and some beans; and concerning the beans Elder told him he didn't figure the ducks would eat these beans; Elder also agreed with Chief Macklin, beans were very poor feed for ducks.

7. On October 14, the appellants contacted Game Warden Getman and expressed doubt that the feed would be cleaned up before the opening of the shooting season; that Game Warden Getman stated that he would check into the matter, and on the 15th he advised Warden Spicer of appellants' talk with respect to inspecting the Club. Warden Spicer denied that Getman so told him, but his diary disclosed that on October 16 his activities were ". . . to Santa Clara River Bottom, gun clubs," and he identified the club in question as being in the Santa Clara River Bottom; on October 18 appellants noticed a Fish and Game car around the Club property driving along slowly; that they waved to the person in the Fish and Game car, and that this person waved back but speeded up and drove off; that since the Game Warden did not stop they concluded that he had checked the Club and that everything was all right.

8. That three days prior to the opening of the shooting season Federal Warden Jack White inspected the Club property thoroughly at the request of appellants and were told that they had nothing to worry about; that with the

two or three thousand ducks then present the feed would be cleaned up; White said he found some beans around the road that the ducks wouldn't eat and a little scattered barley, and that he told appellant McCormick it wasn't anything to worry about, and that he saw no reason why they shouldn't go ahead and shoot. Warden White made a second inspection on October 20, and his diary reflected "had a little feed still out and some beans the ducks won't eat. These have been out for some time."

9. The Chief Warden in charge of the California area (Macklin) was consulted by appellants two days before the opening of the season; he was informed that Warden Spicer had been unfriendly and harbored some resentment against club members; Macklin told appellant Maxwell that he would instruct Spicer to contact him when anything came up in the area which involved enforcements against clubs in the area; that he had instructed the game wardens and captains not to make technical arrests; that if the club was reasonably cleaned up that there wouldn't be any arrests made.

In an extensive reading of the cases on entrapment, we have found no case on the facts which so strongly establishes the lack of conception of any intention to commit these offenses, and on the other hand of incitement, inducement, suasion and representations by Government officers, luring appellants to commit acts, and considered by them innocent acts, which now form the basis of the alleged offenses in this case.

Probably the leading case involving entrapment is *Sorrells v. United States,* 287 U. S. 435, 77 L. Ed. 413, 86 A. L. R. 249. In that case, the majority of the Supreme Court held that entrapment was a jury question, "and that the trial court was in error in holding that as

a matter of law there was no entrapment and in refusing to submit the issue to the jury."

In the case of *Capuano v. United States* (1 C. C. A.), 9 F. 2d 41, it was held that the Court erred and the case reversed. The Court refused an instruction on the hypothesis that the accused never conceived bribing prohibition agents, but was incited and lured into committing offenses by Government officers in order to entrap him and charging instead that the fact that officers offered the defendant a chance for bribing them was no defense, unless the agents went to the defendant for the purpose of framing him, or having defendant give a bribe.

In *Louie Hung v. United States,* 111 F. 2d 325, the Court stated:

> "The court properly instructed the jury on the subject of entrapment. (Citing cases.) The jury were entitled to conclude from the evidence that the intent and purpose to violate the law were present and that the officers had done no more than furnish appellant the opportunity of committing the offense. It is enough to say that the showing of entrapment was not so clear as to entitle appellant to an acquittal as a matter of law."

In the case of *United States v. Brandenburg,* 162 F. 2d 980, 982 (3rd C. C. A.), the Court stated:

> ". . . (citing cases) But *Cf.* Morei v. United States, 6 Cir., 1942, 127 F. 2d 827. In the Morei case, *supra,* the court, stressing the fact that government agents had induced the defendant to violate the law, cited the minority opinion of the Sorrells case to

> support the conclusion that entrapment had existed as a matter of law. . . . Examination of the charge of the court in the instant case reveals that the entrapment question was fairly and adequately submitted to the jury."

In the case of *Myer v. United States,* 67 F. 2d 223, this Court reviewed numerous decisions on the subject of entrapment. In this case, the Court said:

> "The inconsistencies and contradictions in the testimony of the witnesses were, of course, a question for the jury, and, needless to say its determination thereof is binding on this Court."

This Court said the trial court had "fully and clearly instructed the jury on the law relating to entrapment, in accordance with the definition thereof stated by the Supreme Court in the Sorrells case. . . ."

See also:

United States v. Kendall, 165 F. 2d 117, 119 (7th C. C. A.), and

Jindra v. United States, 69 F. 2d 429, 431.

The case of entrapment made out in this case is so clear as to bring it under the rule entitling appellants to an acquittal as a matter of law.

Morei v. United States, 167 F. 2d 827;

Sorrells v. United States, 287 U. S. 437, 454.

II.

The Court Erred in Giving Government's Instruction No. 19-A.

This instruction appears in full, *supra,* at pages 16-17.

The jury might well have concluded from the evidence that there was no grain or other duck feed whatsoever or in insufficient quantities on the premises as to constitute a lure at the time the ducks were taken, but could come to no other conclusion but what grain had been put out prior to the season opening, as the facts of pre-season feeding were admitted; and, under the Court's instruction had to find appellants guilty.

The evidence disclosed that about one and five-eighths tons of barley grain was spread in the hunting area approximately ten days previous [R. 395, 399] by permission of the various game wardens. [R. 240, 242, 418, 427.] A duck will eat a half pound of grain a day. [R. 347.] There was evidence that on the opening day of the shooting season, October 21, and immediately prior thereto, there was such a quantity of ducks present, that in one day they would have consumed more than all of the duck feed (the grain) which had been spread approximately ten days before. [R. 245, 341, 392, 189, 344, 361, 288.]

The evidence of the defense was that on the 22nd of October there was no barley grain on the premises; that none was observed as being on the premises; and what, if any, that remained on that day was at most an infinitesimal quantity scattered in the pickle weed inaccessible to the ducks and in such an insufficient amount as not to be considered bait for the ducks. (See page 9, *supra.*)

The ducks were on watered ponds at the opposite of the southwest corner where there was evidence of lima

beans having been placed by the farmers, who were farming the Club's premises, for the purpose of attracting mudhens away from pimiento fields which lay on the north of the Club's property and close to where the ducks were concentrated on the watered ponds. There is no evidence that any of the ducks confiscated had lima beans in their craws, although they were in the Government's possession even at the date of the trial, and the overwhelming evidence was (including witnesses of the Government) that it did not constitute duck feed. [R. 405, see pages 4-5, *supra.*]

There is only evidence that appellants Carty and James McCormick [R. 117] shot on the 21st, as well as the 22nd of October. There is evidence that one Stevenson [R. 411], a guest, shot on the 22nd, but saw no grain on the premises.

The regulations read to the jury by the Court prohibits the *taking* of birds "directly or indirectly, by means, aid, or use of shelled, shucked corn, or of wheat or other grain, salt, or other feed that has been so deposited, distributed, or scattered as to constitute for such birds a lure, attraction, or enticement, *to, on, or over the area where hunters are attempting to take them.*" (Emphasis added.)

The normal practice of all clubs, and because of instructions from the enforcing officials pursuant to their interpretation of the regulation, is to feed in advance of the shooting season, conditioned upon the duck feed being consumed prior to the opening of the shooting season. [R. 186, 210, 240, 418, 427.]

The Court gave confusing and repugnant instructions in submitting the issue as to what constitutes a violation of the Migratory Bird Treaty Act regulations.

Under these instructions one violated the Act even though prior to shooting one had inspected the premises and the inspection disclosed no grain, duck feed or bait whatsoever; and even though this be a fact, that, nevertheless, said person, even though he be a guest, could be found guilty if there had been any previous feeding attracting the ducks to the area so that they could be shot after the season opens. [R. 456-457.]

The Court instructed that "hunters shall investigate at their peril the conditions surrounding the fields and areas in which they are doing their hunting. [R. 456.] . . . He was under a postive duty to investigate for such conditions before hunting in the area," and the regulation "is violated whether the hunters had pursued the indirect method of baiting before the season opened so as to keep the birds in the hunting area to be shot after the season opens [R. 457] . . ." And "that the word 'indirectly' equally applies to any luring of the birds by grain or other feed to the hunting area." [R. 458.]

Obviously the Court's instruction interpreting the regulation as being violated by "indirect method of baiting before the season opened so as to keep the birds in the hunting area to be shot after the season opens," is an improper interpretation and application of the regulation, as the prohibition is against luring, attracting or enticing by feed "to, on, or over the area where hunters are attempting to take them." The "lure," "attraction" or "enticement" *is* "to, on, or over" the area where the hunters are presently attempting to take them.

This instruction is a reiteration of the dictum of Justice Denman in *Cerritos Gun Club v. Hall,* 96 F. 2d 620, 624. There an appeal was taken from a decree dismissing without leave to amend a bill seeking to enjoin Federal offi-

cers from prosecuting the petitioners for luring, with grain, migratory game fowl to their properties, there to be shot by their stockholders and members. Among the averments of the bill, which the dismissal required this Court to accept as true, was that the furnishing of accommodations and opportunity to hunt were "made possible of accomplishment only by luring and keeping the migratory game there, through distributing over the premises barley grain upon which the birds can subsist and . . . as alleged, their occupants and users will cease to use them unless the duck clubs bait the premises to lure the game there." Thus in the *Cerritos* case there was an undisputed factual situation, of persistent and continuous feeding, carried out not during the closed season, but during the open shooting season.

We say that the referred to dictum of our now Chief Judge Denman is dictum because it was wholly unnecessary to a determination of the validity of the Migratory Bird Treaty Act and the regulations promulgated in pursuance of the Act. The dictum apparently resulted from taking a different view than that expressed by the Court of Appeals in *Cochrane v. United States,* 92 F. 2d 623; Justice Denman said that he did not "agree with the dictum of that case that bringing the line of flight of wild fowl by baiting to a hunting territory, is not 'indirectly' a 'luring' within the meaning of the regulation," observing that he believed "the appellants have violated the Secretary's regulation whether by pursuing the indirect method of baiting before the season opens to keep the birds there to be shot after the season opens . . ." Further that it was dictum appears from the fact that the pleading in the *Cerritos* case alleged continuous feeding of the area during the shooting season. This fact placed them in violation of

the regulation as such, leaving only the question of the validity of the regulation. The regulation was held to be valid by all of the judges in their separate opinions.

Neither Justice Stephens nor Justice Healy adopted the views of Justice Denman in their opinions, but both agreed with each other and Justice Denman in the conclusions reached, that the judgment of the lower court in dismissing the bill should be affirmed, which cannot be said to be an approval of this instruction taken *haec verba* for Justice Denman's single opinion.

It is interesting to note that Justice Healy observed (p. 631):

> "The matter in controversy in this suit, is the right to *take* migratory birds by means of baiting. Appellants have undertaken to champion that right. . . . It is without point to say that, except for the regulation, the appellants would be free to distribute grain on their lands or to put out feed which will attract wild ducks. *The regulation does not prohibit that. It prohibits taking ducks with the aid of baiting;* . . ." (Emphasis our own.)

Also, at page 629, in commenting on the significance of the word "indirectly" in the regulation, Justice Denman states: "that 'indirectly' clearly applies to any luring by grain of the birds to the hunting areas, *regardless of whether the grain is spread before particular blinds or more widely scattered.*" This latter statement is consonant with the observation of Justice Healy, but not with the dictum which formed the basis of the challenged instruction.

In the case of *Cochrane v. United States, supra,* on appeal from a conviction of violating the Migratory Bird

Treaty Act and its regulations, the appellants challenged the sufficiency of the evidence to support the finding of guilt; the evidence disclosed the appellants were in hunting clothes, possessed shotguns, a shotgun was fired, and thereupon ducks arose from the pond near a blind; shortly before the shot in question witnesses saw employees of the gun club dump corn into the water about 150 yards from the blinds; that in the course of an hour the corn floated in and about wooden decoys which were placed a short distance in front of the blinds. Of this situation, the Court held that the evidence established a violation of the regulation, saying at page 628:

> "It is unnecessary for us to define the limits of this section inasmuch as the facts in the instant cases fall clearly within it on any reasonable construction of it.
>
> "We do not understand that this regulation prohibits the placing of corn, wheat, oats or other grain, or any other kind of feed whatsoever, into rivers, lakes or ponds to induce and entice water fowl to take a certain route in their migration. *It is not the feeding of the birds that is condemned but rather the feeding of them in such a way as to lure them close to a blind wherein hunters are lodged that is prohibited.*" (Emphasis our own.)

The instruction as given to the jury tells them that the "indirect method" consists of pre-season feeding, as distinguished from the "direct method" of placing the feed in front of shooting blinds during the season. We believe that this instruction is faulty and is contrary to the views expressed by Justice Healy and those of the Seventh Circuit. Apparently the enforcement officers also have a contrary view, since they advise that feeding may

take place within a reasonable time prior to the opening of the season. By the Court's instruction, the jury was told that any feeding, no matter when it occurred (and that could be from ten days to thirty days, or even longer, before the opening of the season), to keep the birds there to be shot after the season opens was a violation. This means that even though the feed had been disposed of weeks in advance of the shooting season, if any birds were presently in the area where the feed had been scattered—which, of course, in spite of the original scattered feed having been consumed frequently occurs because of the presence of natural duck feed—it would nevertheless be a violation. It is a matter this Court can take judicial notice of that even in the absence of natural feed or any feeding whatsoever in the area, that fresh water itself is a basic attraction to ducks; we know that ducks not only eat but must drink fresh water in the course of their long flights of migration.

We assert that the only reasonable interpretation of the regulation is against luring, attracting, or enticing by feed "to, on, or over the area where hunters are attempting to take them." This would indicate that it must be the taking of ducks "with the aid of baiting." The taking of ducks by the aid of baiting may be direct by placing feed in front of blinds, or, indirectly by scattering the feed over a wider area; but in any event, the baiting must be contemporaneous with the taking or attempted taking of the ducks. As said by Judge Evans in *Cochrane v. United States, supra,* at page 628:

> "Clearly any regulation which is destructive rather than promotive of wild game life would be void. Equally clear, we think, is the legislative intent to permit duck and geese hunting."

Every regulation should receive sensible construction. General terms should be limited in their application so as not to lead to injustice, oppression and an absurd consequence. The Supreme Court has said it will always, therefore, be presumed that the legislator intended exceptions to its language which would avoid results of this character, and that the reason of the law in such cases should prevail over its letter. (*Sorrells v. U. S.*, 287 U. S. 434, 447, 777 L. Ed. 413, 419.) We go further and say that the Court's instruction in this instance even does violence to the letter of the regulation. We know that the Court's interpretation of this regulation and that of the enforcement authorities, and upon whose instructions and advice the appellants acted, is entirely different. A regulation (or statute) which forbids the doing of an act in terms so ambiguous that men of common intelligence must necessarily guess as to its meaning violates the first essential of due process of law. (*Connally v. General Construction Co.*, 269 U. S. 385, 391; *United States v. Cohen Grocery Co.*, 255 U. S. 81, 87-88.) Such ambiguity cannot be cured by judicial construction which seeks to specify "details of the offense intended to be charged." (*Lanzetta v. New Jersey*, 306 U. S. 451, 453.)

In *Screws v. United States*, 325 U. S. 91, Justices Roberts, Frankfurter and Jackson, in a joint dissenting opinion, said at page 153:

> "What the Constitution requires is a definiteness defined by the legislature, not one argumentatively spelled out through the judicial process which, pre-

> cisely because it is a process, cannot avoid incompleteness. A definiteness which requires so much subtlety to expound is hardly definite."*

In *Screws v. United States, supra,* at page 154, it was further stated:

> "Federal prosecutions must be founded on delineation by Congress of what is made criminal. To base federal prosecutions on the shifting and indeterminate decisions of courts is to sanction prosecutions for crimes based on definitions made by courts. This is tantamount to creating a new body of federal criminal common law."

In *United States v. Wiltberger,* 5 Wheat. (18 U. S.) 76, 96, Chief Justice Marshall said:

> "To determine that a case is within the intention of a statute, its language must authorize us to say so. It would be dangerous, indeed, to carry the principle, that a case which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated."

In *Pierce v. United States,* 314 U. S. 306, 311, the Supreme Court said that a "judicial enlargement of a criminal act by interpretation is at war with a fundamental concept of the common law that crimes must be defined with appropriate definiteness."

---

*Every law, in a broad sense, is a regulation, and, conversely, every regulation is a law. Each is a command of the legislators and regulates human conduct or behavior. In criminal law it imposes criminal punishment, and in civil law it creates and commands its performance under threat of execution.

In *Kordel v. United States,* 335 U. S. 345, 348-349, the Supreme Court said:

> "A criminal law is not to be read expansively to include what is not plainly embraced within the language of the statute (*United States v. Resnick,* 299 U. S. 207; *Kraus & Bros. v. United States,* 327 U. S. 614, 621-622), since the purpose fairly to apprise men of the boundaries of the prohibited action would then be defeated. *United States v. Sullivan,* 332 U. S. 689, 693; *Winters v. New York,* 333 U. S. 507."

The rule now under discussion is well illustrated by the decision in *France v. United States,* 164 U. S. 676, 682-683.

In *Viereck v. United States,* 318 U. S. 236, 243, the Court said:

> "The unambiguous words of a statute which imposes criminal penalties are not to be altered by judicial construction so as to punish one not otherwise within its reach, however deserving of punishment his conduct may seem."

See *United States v. Evans,* 333 U. S. 483, 486, where the Court said:

> ". . . there are limits beyond which we cannot go in finding what Congress has not put into so many words or in making certain what it has left undefined or too vague for reasonable assurance of its meaning. In our system, so far at least as concerns the federal powers, defining crimes and fixing penalties are legislative, not judicial, functions."

Further the instruction was faulty (a) for failure to define what is meant by "whereupon the hunters may

flush them as they walk or punt over the preserves"; and (b) for instructing on a matter which was not in issue by any evidence whatsoever.

The words "*flush* . . . as they walk" and "*punt* over the preserves" may have some meaning to a seasoned hunter in Eastern States, but hardly to a California hunter and much less to a lay jury. In Southern California, as with this Club, the hunting is done from blinds set in artificial dykes surrounded by water.

The word "punt" for example is not such a word of general usage as to give it common understanding and meaning. Even its dictionary meaning requires a lawyer's skill to read meaning into it as applied to duck hunting. Webster's New International Dictionary defines "punt"—"To propel, as a punt, by pushing with a pole."

We apprehend that what the trial court attempted to do was to say that pre-season feeding which lures ducks to a hunting area, enabling the hunters after the opening of the shooting season while walking the preserves to flush ducks out or by (punt) a pole, propel them out to be shot, violates the regulation. Had the instruction been so framed it still would have been bad for all the reasons above given to the one which the Court did give. But this is not what the Court said—what he did say was that the regulation was violated by (1) pre-season feeding which kept the birds in the hunting area to be shot after the season opens, and (2) "whereupon the hunters may flush them as they walk or punt over the preserves."

Mere 'flushing" or "punting," during either the "open" or "closed" season in areas in which feeding goes on, itself is no violation; it is the actual taking or shooting of the birds that is condemned.

The "flushing" and "punting" phase of the instruction was a confusing and ambiguous redundancy. To leave the jury without the "rudder ~~or~~ compass" of the applicable meaning of these terms was an invitation to conjecture and miscarriage of justice.

Too, there was no basis in the evidence for an instruction on taking birds by the method of "flushing" and "punting." There was no evidence of any "flushing" or "punting." In fact the evidence affirmatively established that the hunting was from blinds set in dykes surrounded by water and that the premises were not adaptable for any such method of hunting as flushing or punting. By this instruction a wholly false and unwarranted issue was introduced into the case.

The erroneousness of not defining the terms "flush" and "punt," and introducing a warranted false issue is so academic as not to require the citation of any authorities.

In summary, the Court submitted the question of guilt to the jury upon three issues:

1. Lima beans. (a) Was it duck feed? If, yes; then (b) was it present in such quantities as to constitute a lure, and (c) was it in such proximity to the hunting area as to constitute a lure.

2. Grain. Was grain present in the hunting area at the time of taking of the ducks, and if so, was it present in such quantities as to constitute a lure.

3. Was grain put out as pre-season feed which kept the ducks in the hunting area, although consumed prior to the opening of the shooting season.

The jury came into Court during the course of its deliberations of two days and announced three distinct times that it could not agree upon a verdict. [R. 471-474.] One may reasonably infer from this, that in view of the overwhelming evidence that lima beans was not duck feed that the jury had a reasonable doubt on issue (1) above; likewise that such a doubt existed as to issue (2) above, in view of the affirmative evidence of no grain being present at the opening of the season, the small quantity of pre-season feed put out, the eating habits of ducks, the conflicting evidence of government witnesses as to the amount of grain present and the impeachment testimony of one game warden who was a friend of the government's primary witness that this government witness had only found a few buckets of grain on the Club's premises. This inescapably points up issue (3), the erroneous instruction on pre-season feeding, as the one which the jury after very lengthy deliberations resolved against the defendants.

Conclusion.

It is accordingly submitted that error of a prejudicial character has been established in connection with each of the specifications relied upon.

It is submitted that the judgment should be reversed.

Respectfully submitted,

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No. 12590.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

EDWIN L. CARTY, H. McCORMICK, EUGENE DOUD, JAMES R. DOUD, VINCENT DOUD, RAYMOND E. FARRELL, JAMES D. McCORMICK, ROBERT MAULHARDT and EDWARD C. MAXWELL,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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IN THE

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FOR THE NINTH CIRCUIT

EDWIN L. CARTY, H. McCORMICK, EUGENE DOUD, JAMES R. DOUD, VINCENT DOUD, RAYMOND E. FARRELL, JAMES D. McCORMICK, ROBERT MAULHARDT and EDWARD C. MAXWELL,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

Statement of Pleadings and Facts Disclosing Jurisdiction.

This is an appeal from a judgment of conviction for the violation by appellants of Section 703, Title 16, United States Code, and regulations pertinent thereto, which makes it an offense to hunt and kill or attempt to kill and take migratory waterfowl and migratory game birds over baited ponds and also by means, and use of shelled wheat, corn, and other grain, or other feed deposited, distributed and scattered so as to constitute for such birds a lure, attraction, or enticement to fly over the area where hunters are attempting to take them. All appellants were charged with the aforesaid violation jointly in a one count Information, and trial by jury was had in the United States

District Court for the Southern District of California at Los Angeles, Calif., resulting in a conviction of said offense. The jury returned the verdict of guilty on March 9, 1950. A motion for new trial was made, heard and denied on March 20, 1950, by the Honorable Harry C. Westover, Judge presiding. On the same date the Court sentenced each of the appellants to pay a fine to the United States in the sum of $500 each.

A notice of appeal to this Court was filed on March 24, 1950, at Los Angeles, Calif., which Court has appellate jurisdiction under Title 28, U. S. C., Section 1291. The District Court had jurisdiction under Section 3231 of Title 18, U. S. Code.

Statement of the Case.

Facts.

The statement of facts set forth in appellants' opening brief, commencing on page 2 thereof, is not acceptable to appellee for the reason that the statement is too selective and interpretative as well as argumentative. The following summary of the evidence pertinent to the questions before this Court is submitted as a more objective synopsis, as opposed to the "shotgun approach" to the facts made by appellants.

At approximately 6:00 o'clock P. M., October 21, 1949, Deputy United States Game Wardens inspected the premises of the Santa Clara Game Preserve near Oxnard, California, at which time it was observed that the ponds, dikes and roadways of such premises were heavily covered with threshed barley and lima beans. United States Game

Management, Agent, A. W. Elder, of Los Angeles, was that evening notified of such fact; later the same evening Agent Elder further inspected the premises and confirmed the observations made by the Deputy United States Game Wardens.

On the following morning, October 22, 1949, at 7:00 o'clock A. M., the defendants were observed among others hunting and taking wild ducks on the said premises of the Santa Clara Game Preserve. Thereupon Agent Elder and the Deputy United States Game Wardens, all of whom had been making such observations, entered upon the said premises, as some of the hunters were beginning to leave their duck blinds where they were shooting. On entering the premises it was again observed that a roadway thereon, adjacent to the ponds, and several of the dikes upon the premises, were covered with lima beans and threshed barley. As the hunters came in from their hunting stations their names and addresses were taken, their thirty-five ducks and one goose confiscated, and each hunter notified of an apparent violation of the Federal Laws against baiting of migratory waterfowl. All defendants except Vincent Doud and Raymond W. Farrell were so apprehended and their ducks confiscated at this time. At about 1:30 P. M. of the same day the other two defendants were observed shooting over the same premises, under the same conditions as aforesaid. They were likewise notified by Agent Elder and Deputy United States Game Wardens of the Federal violation and their birds confiscated.

Thus, there are two essential elements of the offense charged in the information:

First: The taking, hunting, or killing of migratory game birds;

Second: Over ponds or other hunting areas by means, aid, and use of shelled grain distributed thereover so as to constitute a lure, attraction and enticement to such birds.

The first half of the 1949 duck hunting season opened for shooting at noon on October 21 [R. 72-73]. On October 8, 1949, thirty-six sacks of dried lima beans were emptied on the southwest corner of the club, which occupied about forty acres. Each sack of lima beans weighed about 100 pounds, or a total of 3,600 pounds or one and three-fourths tons. Also, it is uncontroverted that forty-one sacks of grain barley were distributed on the grounds of the club prior to the opening of the 1949 duck season. Each sack weighed about 90 pounds or a total of approximately one and three-fourths tons of grain in addition to the lima beans [R. 394-395]. Of this it is admitted by appellants that three-fourths was net grain or one and three-eighths tons, while the remaining 25% was radish seed, chaff or foreign matter [R. 398 and App. Op. Br. p. 4]. The last distribution of grain was made on October 13, 1949, or approximately one week before the shooting season opened. The evidence was conflicting on the question whether ducks would eat lima beans, but appellants concede that testimony was received from which a jury could have believed that lima beans would be eaten by ducks as feed, especially if they were hungry [App. Br. p. 5 and R. 126, 209, 213 and

332]. See also 255, 257 and 259 of Record. Appellants at no time deny or raise the issue as to whether or not grain barley such as distributed here constituted feed that ducks would eat, whether hungry or not. The testimony was that ducks and geese would definitely eat barley [R. 238]. Appellant Maxwell, who was Secretary-Treasurer of this Club [R. 267-268], was told by Deputy U. S. Game Warden Edgerton, when the feed question was raised, on October 8, 1949, that other clubs had been advised and it was mutually agreed that if they stopped feeding 10 days before the season, the *feed should* be eaten up, but it was further stipulated that under no circumstances were they *to shoot* over a baited area [R. 240]. (Emphasis ours.)

This conversation began from Maxwell's inquiry of Edgerton as to whether there had been any changes in the feeding regulations for the 1949 season [R. 267]. Appellant Maxwell then requested Edgerton to call Earl Macklin [Asst. Chief Patrol for Calif. Div. of Fish and Game—R. 319] about whether the regulations had been changed and to let him know [R. 267-268]. Macklin had a conversation with Maxwell on Oct. 19, 1949, and discussed feeding seventy-two hours before the season opened. He told Maxwell that appellant Carty brought up the question before the Fish and Game Commission at a meeting in San Francisco, Nov. 5, 1948. The question was more or less threshed out at this meeting—and Carty was told that while seventy-two hours might be a reasonable time, it made no difference whether it was seventy-two hours or eighty-six hours, the fact still remained that the feed must be cleaned up before the shooting started [R. 322-323]. Maxwell was told there was no definite

time but the feed must be cleaned up before shooting started on any club, as that would constitute a violation of Federal Regulations [R. 322]. This advice to Carty and Maxwell resulted from a legal opinion from the State Attorney General's office on the interpretation of the Federal regulation [R. 322-323]. Maxwell was told by Macklin that he felt if the club was reasonably cleaned up, there wouldn't be any arrests made and that wardens under Macklin's supervision were instructed not to make any "technical arrests." Macklin was a defense witness [R. 319, 325].

On October 22, 1949, Maxwell called Macklin and reported they had been arrested, and admitted to him that there was some feed on the premises that day [R. 330]. Macklin further testified in his opinion the grain shown in the picture shown to him, and so identified in Government's Exhibit No. 4, would be a violation [R. 334-336].

Appellants Carty and James McCormick knew there was a quantity of lima beans in the area. On the day the season opened, and after he had his limit of ducks, Carty told Jack Bedwell, who was a Deputy U. S. Game Warden, "Those beans out there look bad and they should be covered up" [R. 348, 401, 402 and 408]. He admitted that A. W. Elder, U. S. Game Management Agent, said he had warned him (Carty) in 1948 about shooting over baited ponds [R. 355].

Elder testified he inspected the Santa Clara Club on October 22, 1949, and found grain broadcast and scattered quite widely in the center of the club shooting area—barley along the cross dike—in very heavy dribbles where it appeared a sack had been carried on someone's shoulder, allowing barley to leak out where it was carried, with here

and there a little pile or so, approximately five or ten pounds estimated in each pile [R. 180-181]. He with other wardens, Bedwells, Spicer and Edgerton, saw and heard shooting in the area and ducks fall to various hunters [R. 183]. Seven appellants were arrested in the morning and two more in the afternoon. All had shotguns, and their birds were confiscated as evidence [R. 208, 209].

Contrary to the statement made by appellants in their brief at the center of page 15, the ducks and one goose *were* offered in evidence, as follows:

> "Mr. Johnson: The Government wishes to make an offer of evidence. Should counsel for the defense (Testimony of Alvin W. Elder) require them, we [190] could bring these frozen ducks and one goose into court.
>
> Mr. Irwin: It is not necessary. I will stipulate the defendant had the ducks and the other.
>
> Mr. Johnson: And the goose.
>
> Mr. Irwin: That's right."

Government Exhibit No. 4, in evidence, was further identified as being a picture of barley on the ground, which was found in practically every foot of the premises, except cross dike No. 5 [R. 195-196]. Also, Elder saw the "lima beans spread as if the tail gate of a dump truck had been cracked open a couple of inches and backed down a road spreading them quite evenly." Elder's first inspection of the premises was made upon arrival at the prem-

ises about 1:00 A. M., October 22, 1949, after Warden Spicer called him at Bakersfield from the Ventura-Oxnard area, about 8:30 P. M., October 21, stating that the Santa Clara Game Preserve (appellants' club) was baited with barley [R. 177-178]. Samples of barley and lima beans were received in evidence as Government's Exhibits Nos. 12, 13 and 14 [R. 198, 200, 202 and 203].

Warden Spicer inspected the club area at night with flashlight and later returned 6:30 A. M. the 22nd, after seeing a quantity of grain everywhere, taking samples, and after meeting with Wardens Bedwell and Edgerton. They parked their cars at the edge of the Santa Clara river bottom, about two-tenths of a mile from the club and observed hunters with binoculars, later identified as appellants, on this particular club shooting ducks.

Questions Involved.

I.

Whether the Court committed error in not submitting the issue of entrapment to the jury?

A. Whether or not there was any evidence of entrapment which a jury should have passed upon as a question of fact?

II.

Whether Government Instruction 19-a was a correct statement of the law, as applied to this case?

A. If not, whether the error, if any, was harmless?

ARGUMENT SUMMARY.

Only two real issues are presented by this appeal, first whether the trial court committed error in holding as a matter of law the defense of entrapment was not available to appellants, thus refusing to submit that issue to the jury with appropriate instructions. Second, the appellants complain of Instruction 19-a which they claim left the impression with the jury that pre-season feeding was an indirect method of baiting, and therefore illegal.

Neither position taken by appellants has any substantial merit. Neither position is tenable upon the reading of the entire record of evidence and all of the instructions given. There was not the slightest degree of entrapment here by Federal Wardens or agents, within the meaning of the standard set by the leading *Sorrells* case. None of the appellants was induced, enticed or "decoyed" into shooting over baited ponds or areas. The only decoys present here were those planted by appellants, figuratively speaking. Not the floating imitation ducks as decoys, but the real entrapment in this case was the presence of grain, barley, and other feed such as lima beans in the area which the jury found constituted a lure, enticement and attraction to wildfowl to come within range of the hunters' shotguns.

The offense as charged in the Information was that simple. Either these appellants did or did not shoot, hunt and take or attempt to take migratory birds over such a baited area. Lack of knowledge of such conditions and

the existence of grain or feed is no defense. Hunters shoot or hunt at their own peril under the law here.

However, one appellant, Carty, had been warned in 1948 by the Chief Federal Wildlife Conservation Agent, A. W. Elder. Again Carty was told at a State Fish and Game Commission meeting in San Francisco in 1948 that it mattered not how long or how short a time before the season opened that feeding stopped on the clubs, the important thing was that no grain or feed whatsoever be present in the area where hunting took place during the season. The Act and regulations specify no time limit within which pre-season feed or grain may be scattered or distributed. The controversial instruction implies that none may be put out and be left there prior to the season, and remain there after the season opens. It is uncontroverted that feeding after the season opens would be a violation.

The instructions as a whole were clear on the law as it applies to the case. When read in its proper setting, it is inconceivable that the instruction in question could have misled anyone. If any errors was committed, which is not conceded, it was harmless, the defect having been cured by other instructions.

The main purpose of the Migratory Bird Treaty Act and its regulations is to preserve and conserve our wild life resources. It provides a limited season within which ducks, geese and other migratory birds may be hunted. It prohibits hunting over baited areas. The reason for

this is to equalize the contest between hunters and birds and to prevent a possible slaughter of birds attracted by quantities of grain or food, put out as a "lure or trap."

The Act further insures good sportsmanship and applies to all hunters alike, therefore it is equitable. Congress recognized the need for regulation to perpetuate an outdoor sport that is an American tradition. To do this it is necessary for a reasonable percentage of wildfowl to reach their winter home in southern climates and return northward in the spring for nesting and reproduction. In migrating from Canada to Mexico, millions of birds fly across the United States, and stop over to feed or remain awhile on or near waters in Southern California.

The law applies to appellants here and is for their benefit in years to come as men who enjoy the sport of hunting ducks. It applies in this case to protect the privileges of other hunters, elsewhere in this country, now, and those in years to come.

The evidence is overwhelming to support the verdict of the jury finding appellants guilty. No error of law was committed by the trial court prejudicial to the appellants, and the judgment should, therefore, be affirmed.

I.

The Court Committed No Error by Not Instructing the Jury on the Issue of Entrapment.

A. Where There Is No Possibility of Entrapment, That Issue May Not Be Given to the Jury. It Is Only Where the Trial Court Finds There Is or May Be an Entrapment, That the Defendant Is Entitled to an Instruction Thereon.

On the basis of the record here and the evidence received herein, the defense of entrapment was not available to appellants. The trial court was justified in holding as a matter of law that no entrapment existed here and properly refused to submit the issue to the jury as a question of fact. So held in:

Brown v. United States (9 Cir., 1919), 260 Fed. 752.

To the same effect:

Farber v. United States (C. C. A. 9th), 114 F. 2d 5, at p. 10; cert. den., 311 U. S. 706.

"It is claimed that appellant was entrapped and therefore the judgment should be reversed. This defense is applicable only where the officers instigate the crime charged and committed, but does not apply, as here, where the officers discover the criminal in the doing of the crime which has already been instigated or already commenced or planned. See the leading case of Sorrells v. United States, 287 U. S. 435, 53 S. Ct. 210, 77 L. Ed. 413, 86 A. L. R. 249. To allow the defense of entrapment here would be to bar conviction wherever the Secret Service allowed the crime already conceived to be carried out sufficiently to obtain evidence necessary for a conviction of the crime. The defense of entrapment is not here sustained."

See also:

Ratigan v. U. S., 88 F. 2d 919, at 922;

U. S. v. Bates (7 Cir., 1944), 141 F. 2d 435, at 436.

Appellants rely upon the leading case on entrapment, namely, *Sorrells v. United States,* 287 U. S. 435. A rereading of that case indicates the facts are entirely different from this one and therefore distinguished. It was a prohibition case. Sorrells was lured by the agent to commit a crime of which he was otherwise innocent. This was by repeated and persistent solicitations, and by taking advantage of the sentiment aroused by reminiscences of their experience as companions in the First World War (see page 441 of the *Sorrells* Opinion).

That case annouunces the well settled rule that artifice may be employed to catch those engaged in criminal enterprise and that the government may afford opportunity which of itself will not defeat prosecution.

That case concluded by holding that the defense of entrapment was available and that the trial court erred in holding as a matter of law there was no entrapment and in refusing to submit that issue to the jury.

In the present case nothing positive was done by government agents to induce or plant in the minds of appellants and create there a disposition to commit the original offense. This was pointed out by the trial court in the conference on instructions, with both counsel present [R. 466-467]. No Federal Game Warden suggested or planned the distribution of the barley and lima beans over the shooting area of the Santa Clara Club. No Federal officers procured or induced the situation of hunting over

this area by appellants at the opening of the 1949 duck hunting season. In fact the club was open to members only and their guests for hunting. Each one had to procure his own hunting license, buy his own duck stamp, supply his own shotgun, arise unusually early in the morning of the day they were arrested.

Each one had to draw "lots" at the "chuck wagon" for his location in the blinds. Each one had to fire his own shots to bring down the ducks he took that day and it requires no small degree of skill in marksmanship to do that. Each hunter proceeded to hunt at his peril in relation to the condition of baited ponds or areas at the club.

Further consideration may be disposed of in passing. In a prosecution for violation of the Migratory Bird Treaty Act, the prosecution is not required to aver or to prove at trial that a defendant had knowledge of unlawful baiting of hunting grounds in order to render him amenable to punishment for violation. Congress intended to require in this regard that hunters shall investigate at their peril conditions surrounding the fields in which they seek the quarry.

United States v. Reese, 27 Fed. Supp. 833.

That guilty knowledge or intent is not required in such cases was likewise held by the Court in *United States v. Schulze,* 28 Fed. Supp. 234 (1939), and see *United States v. Olson,* 41 Fed. Supp. 433, 434. Furthermore, it is clear that successful hunting or killing or capturing of migratory birds is not a requisite of guilt. Regulation 6.2 issued by the Fish and Wildlife Service, under the Secretary of the Interior, provides as follows: "* * * (e) Take—Hunt, kill or capture, or *attempt* to hunt, kill or capture." (Emphasis ours.)

In the pre-season inquiry by Maxwell and Carty, apparently on behalf of the others, since these two were in a favored position in the club, the wardens were told of the grain existing there and the beans. There was some discussion about the possibility of the grain or other feed being eaten or not eaten before the season opened. At no time or place did any warden tell appellants they could go ahead and shoot if grain or feed still remained there. In their brief and argument appellants urge that all the pre-season feed should have been eaten, calculated on the amount of grain a duck ordinarily eats per day, and the estimated number of ducks that should have been there. Either the ducks did not come in such numbers, or they did not eat enough to make the feed disappear. The jury found as a matter of fact there was ample grain or other feed there sufficient to constitute a lure, enticement and an attraction for the birds to come in.

The game wardens were there to investigate and enforce the provisions of the Migratory Bird Treaty Act and its regulations. They did investigate the conditions there during the night of October 21 (Spicer and Elder) and found grain and beans in quantity scattered about the club. When the appellant hunters moved in at daybreak, or later, and did shoot and kill thirty-five ducks, and one goose, it was the duty of the wardens to make arrests.

In the case of *Newman v. United States,* 299 Fed. 128, 131, 4th Cir., Judge Woods stated the principle that:

> "Decoys may be used to entrap criminals and present opportunity to one intending or willing to commit crime. But decoys are not permissible to ensnare the innocent and law-abiding into the commission of crime. When the criminal design originates, not

> with the accused, but is conceived in the minds of the government officers, and the accused is by persuasion, deceitful representation, or inducement lured into the commission of a criminal act, the government is estopped by sound public policy from prosecution therefor."

The only decoys to be found in this case were not planted by federal agents, but by the appellants themselves. The only persuasion, lure and inducement on the record here is found in the existence of grain, barley and beans there to "entrap" the migratory birds to come within shooting range.

The fundamental purpose of the statute making it unlawful to hunt or kill, except as permitted by regulation, any migratory bird included in terms of conventions between the United States and countries mentioned therein for protection of migratory birds, and the regulations thereunder promulgated by the Secretary of the Interior, is the protection of migratory birds from destruction in an unequal contest between hunter and bird.

United States v. Olson, 41 Fed. Supp. 433 (1941).

As stated in the report of the Special Committee on Conservation of Wildlife Resources to the 77th Congress, 1st Session, pursuant to Senate Resolution 246 thereof:

> "The ultimate objectives of the entire waterfowl program are: (1)To restore, so far as is economically possible, the breeding grounds within the continental United States; (2) to provide feeding areas along the routes of migration and in the wintering grounds in the South adequate to care for the enormous concentrations of birds that occur in the United States during the critical winter months; (3) to pro-

vide reasonable hunting privileges for the more than 1,000,000 duck and goose hunters; and (4) to so regulate the kill that the supply of birds will fully populate all available breeding areas, and thus assure continuation of the sport of wildfowling."

See, also, in connection with the policy and purposes of the Treaty and the Congressional Act, the following:

Cerritos Gun Club v. Hall, supra, 96 F. 2d 620, 629, and

Shouse v. Moore, 11 Fed. Supp. 784 (1935).

Equally well settled is the proposition that hunters have no property right in migratory birds but only such permissive privileges as governmental authorities decree.

Missouri v. Holland, supra, 252 U. S. 416, 434;

Brandenburg v. Doyle, 12 Fed. Supp. 342, 344;

Shouse v. Moore, supra, 11 Fed. Supp. 784, 787.

Nor is the Government's power to protect or regulate the hunting of migratory waterfowl confined to those lands to which it has title.

It is therefore submitted there was not a scintilla of evidence of entrapment here such as existed in the *Sorrels* case. It would have been error had such an issue been submitted to the jury for their deliberation. The trial court found no entrapment in the evidence and there was none. Under such facts as were established here, Carty had been warned a year before about shooting over baited areas; Maxwell, who was Secretary-Treasurer of the Club, had been told before the season opened that under no circumstances could they shoot legally over baited areas. They went ahead and shot anyway and invited their friends or guests to shoot there. The jury found after hearing all the evidence, some conflicting, that grain and

feed did exist there in quantities sufficient to lure and entice birds. Therefore, the theory of entrapment is reduced to absurdity.

Much controversy arose over the lima beans. Carty and other appellants, or defense witnesses, as well as some of the game wardens cast some doubt on whether ducks would eat beans. Some testified they would if hungry enough. How could they defend on the theory that hunting was legal and safe, by assuming the ducks were not hungry enough? Only a duck knows when he is that hungry [See R. 256]. Appellants speculated that sufficient numbers of birds would clean up the barley, but this never happened. They were satisfied to allow the beans to remain, regardless.

That issue was immaterial anyway whether ducks would eat the beans. The real question was whether the beans constituted a lure or enticement to waterfowl in coming to that area. The jury must have so found after one direct instruction placing that issue squarely before them.

Regardless, there was ample evidence to sustain the verdict in that substantial amounts of barley were there besides, according to the testimony of Elder and Spicer as well as others. The jury evidently chose to believe their testimony in this regard as shown by their verdict. Of course the credibility of witnesses and the weight of the evidence is a matter for the jury alone, and may not be disturbed upon appeal, although the appellate court might have reached other conclusions. This principle is so well founded it requires no citations of authority. Where reasonable minds may differ on such questions of fact and there is sufficient evidence to sustain the verdict, as here, the findings of fact will not be disturbed.

II.

The Court Committed No Error in Giving the Government's Requested Instruction No. 19-A.

A. If Any Error Was Committed the Defect Was Cured by Other Instructions and Therefore Was Harmless.

The Court's Instruction No. 38 [R. 26-27] also designated as Government's Requested Instruction No. 19-A [R. 26-27] was a correct statement of the law as applied to the facts of this case. There was no prejudicial error committed in so giving this instruction which clarified the meaning of the applicable section of the Migratory Bird Treaty Act, as amended, 16 U. S. C. A. Sections 703-711, and the regulations pertinent thereto. Said instruction was based upon a construction and interpretation of the same statute and regulations made by this Court in the case of *Cerritos Gun Club v. Hall,* on April 15, 1938, as reported in 96 F. 2d 620.

In order to analyze the Court's instruction complained of by appellants, it is necessary to place that instruction in its proper setting in relation to the other instructions given by the Court immediately prior to its having been given to the jury.

The Court's instructions on the basic statute involved herein and the regulations pertinent thereto, namely, Sections 703-11 of Title 16, U. S. C. A., also known as the Migratory Bird Treaty Act, as amended, and the regulations promulgated by the Department of the Interior under the authority of said Act and in particular Section 6.3 were set forth in the following instructions which

were given to the jury in the following order. [R. 453-457 incl.]

"Section 703 of Title 16, United States Code, provides in part that:

" 'Unless and except as permitted by regulations made as hereinafter provided in Sections 703-710 of this title, it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill, possess,' * * * (or) * * * 'any migratory bird * * * included in the terms of the conventions between the United States and Great Britain for the protection of migratory birds concluded August 16, 1916 (39 Stat. 1702), and the United States and the United Mexican States for the protection of migratory birds and game mammals concluded February 7, 1936. * * *'

"On July 29, 1948, the President of the United States approved and proclaimed a regulation propounded by the Fish and Wildlife Service of the United States, Department of the Interior, under the authority of the Migratory Bird Treaty Act which I have just read to you. That regulation provides in Section 6.3, in part, as follows:

" 'Waterfowl (except for propagating, scientific, or other purposes under permit issued pursuant to Section 6.8), and mourning doves and white-winged doves are not permitted to be taken, directly or indirectly, by means, aid, or use of shelled, shucked corn, or of wheat or other grain, salt, or other feed that has been so deposited, distributed, or scattered as to constitute for such birds a lure, attraction, or enticement to, on, or over the area where hunters are attempting to take them: Provided, however,

such birds may be taken over properly shocked corn and standing crops of corn, wheat, or other grain or feed, and grains found scattered solely as a result of agricultural harvesting.'

"Thus, this regulation which I have just read to you has the effect of law, since it was propounded under the authority of the Migratory Bird Act of 1918, as amended.

"Section 707 of Title 16, United States Code, provides in part that:

" 'Any person, association, partnership, or corporation who shall violate any of the provisions of said conventions or sections 703-711 of this title, or who shall violate or fail to comply with any regulation made pursuant to said sections, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be * * * (punished as the law provides). Thus, there are two essential elements of the offense charged in the information:

"First: The taking, hunting, or killing of migratory game birds;

"Second: Over ponds or other hunting areas by means, aid, and use of shelled grain or other feed distributed thereover so as to constitute a lure, attraction and enticement to such birds.

"There has been testimony that barley and lima beans were found on the premises. It is admitted that barley is grain. The testimony is conflicting as to the amount of barley found on the Santa Clara Game Preserve. It is for your determination as to whether it was present in such quantities as to constitute a lure or enticement for the ducks present, which have been estimated variously between 4000 and 12,000 in number.

"As to the lima beans, you must first determine whether, under the terms of the regulations, lima beans are in the category of 'other feed,' which will lure, entice or attract migratory birds.

"You are further instructed that in a case of this sort, it is not necessary for the government to allege or to prove at trial that a defendant or defendants had knowledge of unlawful baiting over hunting grounds to find him guilty of the offense charged. In such case, guilty knowledge or intent is no part of the issue of the case. In this regard it is required that hunters shall investigate at their peril the conditions surrounding the fields and areas in which they are doing their hunting. Thus, the fact that a particular defendant may claim he did not know the area in which he was hunting was baited as charged in the information may not be considered by you in determining his guilt or innocence of the crime charged. He was under a positive duty to investigate for such conditions before hunting in the area. You are instructed that hunters have no property right in migratory birds, but only such permissive privileges as governmental authorities decree.

"Nor is the government's power to protect or regulate the hunting of migratory waterfowl confined to those lands to which it has title.

"You are instructed that you need not be concerned whether the particular birds in this case are in fact migratory, that is, whether they have actually ever been anywhere other than California in their native haunts; for once the evidence establishes that the particular birds taken are of the species or type included in the Migratory Bird Treaty and the Congressional Act and Regulations in connection therewith, the question of whether those particular birds

actually went out of this state or were raised in this state, or whether they came from Canada, or elsewhere, is not in issue. The only issue, then, is whether the defendants hunted or killed the migratory birds as charged in the information.

"In this connection testimony has been produced to the effect that the birds taken from defendants by the enforcement officers, involved in this case, were of the following types: Sprigs, also known as Pintails, Spoonbill, Greenneck Teals, Redheads, Widgeons, and Cackling Geese.

"You are therefore further instructed that as a matter of law all birds of these types are migratory birds within the meaning of the Treaty and the statute and regulations concerned in this case." [R. 453-457 incl.]

Immediately following the above instructions the controversial instruction designated as 19-A was given to the jury, which is as follows:

"You are instructed that the regulations concerning the baiting of migratory birds is violated whether the hunters had pursued the indirect method of baiting before the season opened so as to keep the birds in the hunting area to be shot after the season opens, whereupon the hunters may flush them as they walk or punt over the preserves, or by directly placing the grain or other feeds in front of the blinds or stands during the season.

"Furthermore, concerning the provisions in the regulation that migratory birds are not permitted to be taken 'directly or indirectly' by means of bait, you are instructed that the word 'indirectly' equally applies to any luring of the birds by grain or other

feed to the hunting area, regardless of whether the grain or other feeds is spread before the bird blinds themselves or is more widely scattered." [R. 457-458.]

The first paragraph of the said controversial instruction was taken from page 624 of the *Cerritos* case Opinion under headnote [4], in which this Court expressed the opinion that the Secretary's regulation would have been violated by the indirect method of baiting before the season opens, so as to keep the birds there to be shot after the first day of the season. Obviously in the light of the regulation itself this would mean that grain would still prevail in the hunting area after the opening of the season which would constitute a lure and enticement to the migratory birds. Obviously there would be no violation if the pre-season feeding of grain resulted in the grain or other food put out being consumed by the birds, or being covered up by the owners of the land, or those who desired to shoot over such premises. It is absurd to conceive of baiting the area, or spreading the grain during the open season without this resulting in a clear, intentional violation of the Act and its regulations. The only issue raised in this instruction was whether or not the jury understood the Court to say that pre-season feeding was a violation *per se*. In view of the trial court's instruction above, to the effect that the jury was to determine whether grain was present in such quantities as to constitute a lure, or enticement for the ducks present, the first paragraph of the controversial instruction constituted a harmless error, if any.

It is inconceivable that a jury made up of reasonable men and women could be mislead by such instruction to

the prejudice of the appellants. If any difficulty existed because of the wording of this paragraph of the instruction, it is submitted that it was cured by the submission to the jury of a clear issue of fact as to whether or not at the opening of the season barley and beans were present in sufficient quantities to induce or entice ducks to settle there and be shot by the hunters on the premises. This appellate court in its Opinion in the *Cerritos* case must have had the same thing in mind in its Opinion as aforesaid concerning baiting before the season opened.

On page 628 of the Opinion in the *Cerritos* case, the Court recognized that in California the feeding of grain begins weeks before the shooting season. The Court raises the question then, without answering it, did the writers of the Treaty consider baiting before or during the season a shortening of the time of the season? There is nothing in the regulations or the Act itself which expressly prohibits the pre-season scattering of grain or wild fowl feeding. However, the regulation is clear and definite in saying that no waterfowl shall be taken over areas where there exists wheat, *or other grain, or other feed,* which has been so deposited, distributed or scattered so as to constitute a lure, attraction, or enticement to, on, or over the area where hunters are attempting to take them. In view of the trial court's instruction concerning all of these things, it is submitted that no prejudicial error was committed in giving the jury this part of the instruction.

As to the second half of the instruction, the trial court again followed the example and expression of the law and its construction as applied to migratory waterfowl as set

forth in the *Cerritos* case on page 629 thereof, this Court stated the law as follows:

> "Nor is there weight in appellants' contention that there is such vagueness in terms '* * * Not permitted to be taken by means, aid, or use, directly or indirectly, of corn, wheat, oats, or other grain or products thereof, salt, or any kind of feed whatsoever, placed, deposited, distributed, scattered, or otherwise put out whereby such waterfowl or doves are lured, attracted, or enticed, * * *' that the offenders are not properly advised of the offense. Common sense discloses exactly what these words mean; it being held that 'indirectly' clearly applies to any luring by grain of the birds to the hunting areas, regardless of whether the grain is spread before particular blinds or more widely scattered."

On this point the Court was holding that the regulation involved in the *Cerritos* case, which was almost identical to the regulation involved here, did not lack the definiteness necessary to describe a penal offense. It further held that the making of the regulation against baiting was not a delegation of legislative powers (p. 629, Note 12). The Court went on to say:

> "* * * The policy of the act is determined by section 3 of the act itself, as amended. 16 U. S. C. A. §704 and note. It is 'to carry out the purposes of the convention,' which are: 'Saving from indiscriminate slaughter' and 'of insuring the preservation of such migratory birds as are either useful to man or harmless.' Certainly it is 'rationally conceivable' by the Congress that prohibiting baited hunting will aid in preventing the extinction of the waterfowl, as the carrier pigeon was extinguished."

> Instruction 19A was given because the Court believed it to be the law in this district. The second paragraph in particular became essential since the defendants (Appellants) claimed that the "congregation of ducks was greatest away from those beans, and so on, and it was the fresh water that attracted the ducks." The Court ruled that such was a question to be argued before the Jury. [R. 464.]

True, the *Cerritos* case was a civil action and the extracts from this Court's opinion may have not been essential to the holding therein, therefore dictum. Yet, the gun club sought to enjoin Peirson M. Hall, then United States Attorney, and other Federal officers from prosecuting the plaintiffs for luring migratory birds to their properties with grain, there to be shot by their stockholders and members. Plaintiffs appealed from a decree dismissing this bill without leave to amend (21 Fed. Supp. 163). This Court affirmed, and upheld the validity of the Act in a well considered opinion that explored the many facets of the Migratory Bird Treaty Act and its regulations. Where then, may a trial court go for better guidance for its jury instructions on the law of a case such as the one in which appellants were tried and convicted? They were charged with shooting ducks over baited ponds, that is over an area where it was conceded and admitted that grain and lima beans were distributed in quantity prior to the opening of the 1949 hunting season. The main issue of fact submitted to the jury was whether the appellants did take or attempt to take waterfowl over an area—in violation of the Act and its regulations. This required a finding of fact on one further issue, whether grain or other feed was present there in sufficient quantity

to constitute a lure and enticement to ducks to come there and be shot by hunters. Having instructed on the elements of the case and the basic law involved, the trial court attempted to clarify and enlarge upon the meaning of the regulations. In doing so, it drew upon the language of the United States Court of Appeals in our own Circuit. It may be said that Instruction 19-a was superfluous; that it was unnecessary once the mandatory instructions on the law of the case and the elements of the offense had been stated to the jury. For men and women of ordinary intelligence this would have been sufficient for as this Court said on page 629, of the *Cerritos* case, common sense discloses exactly what the words of the regulation mean, especially the definition of *"directly* and *indirectly."* This referred to the taking of birds by means of, and the use of wheat, other grain or other feed deposited, distributed or scattered by which waterfowl are lured or attracted. Thus in the light of the excellent basic instruction here given, it is submitted that the jury could not have been misled by the one in question which could have been safely omitted. It may be that the trial court was impressed with an over-abundance of caution, or was imbued with a sense of reverence for the learned Opinion of its next higher court of review. Be that as it may, the restatement by the trial judge of this Court's construction of the meaning of the regulations was not reversible error, but was harmless, if any error was committed. None is conceded by the appellee and while the attempt at further clarity may have resulted in some ob-

scurity, yet it is submitted that the jury was given a correct statement of the law as applied to the facts of this case in the overall instructions.

That the instructions must be considered in their entirety is well established.

To this effect:

United States v. Sorcey (C. C. A. 7th), 151 F. 2d 899.

On page 901 appears the following:

"There is no requirement that any specifically framed charge be given if the general charge includes fair, comprehensive instructions upon the subject-matter involved, and in framing a charge upon the elements bearing upon credibility of witnesses, the court is not to be bound to a hard and fast formula as to each and every phase of his charge."

Also, see:

Taylor v. United States (C. C. A. 9th), 142 F. 2d 808, at p. 817; cert. den., 323 U. S. 723.

To the same effect:

Hargreaves v. United States (C. C. A. 9th), 75 F. 2d 68, at p. 73; cert. den., 295 U. S. 759.

"It is a well-settled principle of law that in determining the correctness of instructions, detached phrases and sentences cannot be singled out and considered alone, but must be construed with their context. Colt v. U. S., 190 F. 305, 308 (C. C. A. 8); Michael v. U. S., 7 F. (2d) 865, 866 (C. C. A. 7)."

The rule with respect to instructions is well announced in a rather recent case, namely:

Pine v. United States (C. C. A. 5th), 135 F. 2d 353, at p. 355; cert. den., 320 U. S. 740.

> "When we turn to the refused requests to charge, we must keep in mind that they are not to be considered abstractly or *in vacuo* as though the court had given no charge at all. They must be considered in their relation to the trial as a whole and especially in the light of the very full and fair general charge given, to which no exception was taken. In short, the refusal as to any of them may be regarded as reversible error if, but only if (1) it is in itself a correct charge; (2) it is not substantially covered in the main charge, and (3) it is on such a vital point in the case that the failure to give it deprived defendant of a defense or seriously impaired its effective presentation."

Even if error occurs in part of the instruction, such error is not reversible, if it is cured by a subsequent charge or by a consideration of the entire charge.

To this effect:

Clarke v. United States (C. C. A. 9th), 132 F. 2d 538; cert. den., 318 U. S. 789.

The rule is also well settled that when the evidence as a whole is convincing toward the defendant's guilt, reversible error does not necessarily occur from an erroneous instruction; to this effect:

Roubay v. United States (C. C. A. 9th), 115 F. 2d 49.

A *narcotic* case of this Circuit, which has been frequently quoted in other opinions and which discusses these general principles pertaining to sufficiency of instructions and the refusal to give certain specifically requested ones as not constituting error, is that of

Mullaney v. United States (C. C. A. 9th), 82 F. 2d 638, at pp. 642 and 643.

It is submitted that the above authorities when dealing with the specific subject matters appellants now complain of, such as entrapment, refusal to instruct thereon, and the giving of Instruction 19A, clearly indicate that no reversible error was committed. This contention is especially true in view of the strong proof of the guilt of the appellants, the admissions made, and the settled rule that credibility is a matter solely for the jury's determination.

Conclusion.

It is respectfully submitted that there was substantial evidence indicating the guilt of the appellants. There was sufficient, in fact, considerable evidence pointing to the guilty knowledge upon the part of appellants. However, lack of knowledge of the existence of grain or other feed in the shooting area is no defense since under the law and regulations given, hunters shoot at their peril. The appellant Carty had been warned the year before by a Federal Warden concerning the shooting over baited ponds. Another appellant, Maxwell, after his arrest, admitted to one of the wardens that there was some feed and grain scattered over the area in question. Although there was some conflict of evidence as to the amount of grain and other feed there, the jury, by its verdict, resolved that question of fact against the appellants.

The instructions, when viewed in their entirety, were fair, proper, and in accordance with the law.

In view of the presence of substantial evidence establishing the guilt of the appellants, it is submitted that no errors prejudicial to the appellants were committed in the District Court.

The issue of entrapment was not submitted to the jury and the trial court found there was no possible defense of entrapment here as a matter of law. The appellants were not entitled to an instruction on entrapment after a review of the evidence in this case.

In view of the foregoing, it is respectfully submitted that the verdict and judgment as to all the appellants should be affirmed.

Respectfully submitted,

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No. 12590

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

EDWIN L. CARTY, H. McCORMICK, EUGENE DOUD, JAMES R. DOUD, VINCENT DOUD, RAYMOND E. FARRELL, JAMES D. McCORMICK, ROBERT MAULHARDT and EDWARD C. MAXWELL,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' REPLY BRIEF.

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vs.

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Appellee.

APPELLANTS' REPLY BRIEF.

The Court Erred in Giving Government's Instruction No. 19-A.

This point is discussed in our Opening Brief at pages 26-38; it is discussed in Appellee's Brief at pages 19-31.

Although we discussed this point as our Point II, we discuss it here first, because the appellee concedes that the instruction was improper; and being improper it follows that the judgment of the lower court for this reason alone must be reversed.

The instruction, which appellee attempts to justify as a harmless error, was basically and jurisdictionally faulty in two aspects: (A) The Court told the jury that it was an offense to pre-season feed which is not an offense

created by the act or regulations; and (B) the Court submitted as an offense one not charged in the information.

(A) The instruction as given to the jury tells them that the indirect method "consists of pre-season feeding" as distinguished from the "direct method" of placing the feed in front of shooting blinds during the open season. By this instruction the jury was told that any pre-season feeding, no matter when it occurred, so as to keep the birds there to be shot after the season opens, is a violation. The statute creates no such offense. The regulation, pursuant to the statute, is against luring, attracting or enticing by feed "to, on or over the area *where hunters are attempting to take them*" either "directly or indirectly." [R. 16.] Thus, migratory birds may not be taken "directly or indirectly" by means of bait, luring the birds to the hunting area during the open hunting season, grain spread before the "bird blinds themselves" or "more widely scattered" over the hunting area where the hunters are attempting to take them. [R. 17.] The baiting must be contemporaneous with the taking or attempted taking of the birds. The regulation here involved *does not* prescribe against pre-season feeding, as the Court instructed the jury.

The information charged that the defendants "did take, hunt and kill, migratory waterfowl and migratory game birds *over baited ponds and areas.* . . ." [R. 2.]

Appellee states at page 24 of its brief, "* * * There would be no violation if the pre-season feeding of grain resulted in the grain or other food put out being consumed by the birds, or being covered up by the owners of the land, or those who desired to shoot over such premises." And again appellee, at page 25, admits the

correctness of our position when he says, "There is nothing in the regulations or the Act itself which expressly prohibits the pre-season scattering of grain or wild fowl feeding." The trial court's instruction is directly to the contrary. This is a clear admission of our position.

We give the further illuminating confessional quotes from pages 28-29 of Appellee's Brief: "It may be said that Instruction 19-a was *superfluous;* that it was *unnecessary* once the mandatory instructions on the law of the case and the elements of the offense had been stated to the jury." "* * * It is submitted that the jury could not have been misled by the one in question which could have been *safely omitted.*" "* * * and while the attempt at further clarity may have resulted in some obscurity, * * *"

Although conceding that pre-season feeding is not an offense, the appellee attempts to justify the erroneous instruction on the premise that "it was cured by the submission to the jury of a clear issue of fact as to whether or not at the opening of the season barley and beans were present in sufficient quantities to induce or entice ducks. . . . to be shot by the hunters on the premises." (P. 25.)

Thus, we have appellee arguing that because the Court correctly submitted the issue as to what constituted a violation as to one phase of the case, it cured the error in submitting to the jury as a violation another phase of the case which he admits does not constitute a violation of the Act or regulation. This is not the law and is an utter absurdity.

Appellee, after acknowledging—as we have seen—that there is nothing in the regulations or the act itself which expressly prohibits pre-season feeding, in desperation to further justify his position that it was harmless,

states that it was taken verbatim from a portion of the opinion in a civil action—the *Cerritos* case—which he acknowledges was dictum, and further (p. 27) says, "Where then, may a trial court go for better guidance for its jury instructions on the law of a case such as the one in which appellants were tried and convicted." This is no justification. In fact this is a classical example of the obvious danger of thus lifting without regard to context or appropriateness, or argumentative character, portions of a court's opinion, and giving it to a jury as an instruction.

The cases cited at pages 29-31 of Appellee's Brief have no application whatsoever to our problem. This is not a case of detached phrases and sentences which might be reconciled with other instructions given and from the entirety that it can be said correctly submitted the issues to the jury. Here we have a plain case of submitting to the jury as an offense something not created by statute as an offense. It can even be said that it is not a matter of inconsistent instructions, but a case of super-imposing upon the whole body of the instructions additional acts as constituting a violation of the statute and regulations which is not contained therein, and which is not even charged.

There are many cases, of course, which hold that "where two instructions are given, one erroneous and prejudicial and the other correct, reversible error occurs."

United States v. Nicola, 72 F. 2d 780;

United States v. Thomas, 151 F. 2d 183;

United States v. Miller, 120 F. 2d 968;

United States v. Notary, 16 F. 2d 780.

(B) The Court submitted to the jury as an offense one not charged in the information. Conviction on charge other than as made by grand jury presentment is jurisdictional and therefore void.

Ex Parte Bain, 121 U. S. 1, 13, 30 L. Ed. 849.

In *Edgerton, et al., v. U. S.,* 143 F. 2d 697 (C. C. A. 9), it was held that an instruction striking from indictment reference to type of security on which money was loaned was error as changing character of representation as alleged, and amending indictment so as to result in trial of defendants on a charge different from that found by grand jury and was violative of the Fifth Amendment to the Constitution.

Also see,

Mahler v. Eby, 264 U. S. 32, 268 L. Ed. 549;

Thornhill v. State of Alabama, 310 U. S. 87, 96, 84 L. Ed. 1093;

DeJonge v. Oregon, 299 U. S. 353, 362, 81 L. Ed. 278, 282;

Stromberg v. California, 283 U. S. 359, 367, 368, 75 L. Ed. 1117, 1122, 1123.

Appellee presents no reply whatever to our points (pp. 35 and 36) that this instruction was further faulty (a) for failure to define what is meant by "whereupon the hunters may flush or punt over preserves" and (b) for instructing on a matter which was not in issue by any evidence whatsoever.

Under the State of the Evidence the Trial Court Should Have Submitted the Issue of Entrapment to the Jury Under the Proper and Applicable Instructions Requested by the Appellants.

The question posed is that the Court should have submitted the issue under proper instructions to the jury, as held in *Sorrells v. U. S.,* 287 U. S. 435, and other cases cited at pages 23 and 25 of our brief. None of the cases cited by appellee are applicable except *Brown v. U. S.,* 260 Fed. 752, which was decided some years before the case of *Sorrells, supra.*

At page 20 to page 23 of our Opening Brief, we have summarized the pertinent facts from our statement of the facts in evidence, pages 3 to 6, which required the giving of an instruction on entrapment under the state of the evidence in two aspects of the case: (1) The evidence of inducement to put out pre-season feed for the birds, in the light of the Court's instruction that the regulation was violated by pre-season feeding, and (2) the evidence of enticement and inducement to shoot after the opening of the season over alleged baited ponds.

Appellee is in error when it states that we rely only upon the leading case of *Sorrells v. United States, supra.* We have cited a number of cases in addition at pages 24-25 of our brief on the requirement of such an instruction to the jury under the circumstances. Appellee does not challenge the correctness of our statement of facts. Appellee does, however, assert at page 15 of his brief, incorrectly that "at no time or place did any warden tell appellants they could go ahead and shoot if grain or feed still remained there." The record is precisely to the contrary. [R. 417, 324, 175-176.]

Conclusion.

For each and all of the reasons herein set forth and in our Opening Brief, it is submitted that the judgment should be reversed.

Respectfully submitted,

Otto Christensen and
John J. Irwin,
Attorneys for Appellants.

No. 12590

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

EDWIN L. CARTY, H. MCCORMICK, EUGENE DOUD, JAMES R. DOUD, VINCENT DOUD, RAYMOND E. FARRELL, JAMES D. MCCORMICK, ROBERT MAULHARDT and EDWARD C. MAXWELL,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR REHEARING.

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No. 12590

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Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR REHEARING.

Comes now the United States of America, Appellee in the above entitled cause, and presents this, its Petition for Rehearing herein.

Preliminary Statement.

Set forth in the appendix hereto is the decision of the Court herein, filed May 17, 1951.

In their opening brief, Appellants, with respect to the Trial Court's Instruction 19-A, dwelt mainly upon the substantive rule upon which such Instruction was based rather than that it constituted an amendment of the Information so as to charge a separate and distinct offense. The latter

point, it is felt, was not considered in all its ramifications subsequent thereto and in oral arguments; the full purport of the court's decision convinces Appellee that certain legal points and authorities may have been overlooked. This may be found particularly true as to those authorities cited and discussed in Ground II hereinafter.

STATEMENT OF CASE FOR REHEARING.

I.

The Information Is Sufficient to Support the Giving by the Trial Court of Instruction 19-A.

By its opinion the Court has held, in effect, that there was a material variance between the Information as filed and matters sought to be proved at trial, and that the Court's Instruction 19-A, covering certain of such proof, constituted an amendment of the Information so as to charge an additional offense. It is submitted that on a basis of semantics alone, and a fair construction of the words used in said Information, Appellants were sufficiently advised of the gravamen of the offense with which they were charged; and further, that Instruction 19-A, based on *Cerritos Gun Club v. Hall* (9 Cir.), 96 F. 2d 620-624, indicated merely a means or mode by which such offense may be committed.

The Information, in substance, charged the offense in the words of the Regulation and Statute concerned [Tr. 452-455]. That an accusation by such means is sufficient, is settled. (*Norris v. U. S.* (9 Cir.), 152 F. 2d 808, cert. den. 328 U. S. 850; *Eagleston v. U. S.* (9 Cir.), 172 F. 2d 194, cert. den. 336 U. S. 952.) The words used, as the Trial Court instructed the jury [Tr. 452-453], charged, in essence, that on or about October 22, 1949, defendants "did take, hunt, and kill migratory waterfowl and migartory

game birds over ponds and areas which *had been* baited by the means, aid and use of shelled grain, namely, barley, and cracked lima beans, which *had been* deposited, distributed and scattered over the ponds and areas so as to constitute a lure, attraction and enticement to said migratory game birds." (Emphasis supplied.) This wording certainly contemplates the possibility of the lures having been present up to just before the season opened and the shooting began, *or* contemporaneously present at the time of the actual shooting; the words "had been" semantically cover either possibility.

Using the words of this Court in *Hopper v. U. S.* (9 Cir.), 142 F. 2d 181, involving a similar situation "* * * the essential elements of the offense are stated, if not directly, certainly by implication." That case also is authority for the well known rule that it is enough if the necessary facts of an offense alleged appear in any form, or by fair construction can be found within the terms of the Indictment.

See:

McCoy v. U. S. (9 Cir.), 169 F. 2d 776 at pp. 779-780.

See also:

Coates v. U. S. (9 Cir.), 159 F. 2d 193;

Stumbo v. U. S. (6 Cir.), 90 F. 2d 828, cert. den. 302 U. S. 755.

And see further:

Fippin v. U. S. (9 Cir.), 162 F. 2d 128;

U. S. v. Wagner (7 Cir.), 143 F. 2d 1, 2, cert. den. 323 U. S. 730.

The latter case cited also calls attention to the rule that a verdict may cure loose or inartificial averments.

The Appellate Court should construe the charge more liberally after judgment than before.

Nicholson v. U. S. (8 Cir.), 79 F. 2d 387.

As stated in *Knight v. U. S.* (8 Cir.), 137 F. 2d 940, the sufficiency of the accusation, in such events, must be judged by practical consideration; "The appellant was under no illusion as to what he was charged with * * *." (P. 942.)

Likewise applicable to the situation at hand is *Newfield v. U. S.* (C. A. D. C.), 118 F. 2d 375, cert. den. 315 U. S. 798, where in considering the sufficiency of an Indictment, the Court said, at page 389:

> "The complaint is against indirect averments. Such defects come within the rule of intendment,—in that a verdict will aid the defective statement of a cause though not a statement of a defective cause * * *. The matter charged to have been indirectly rather than directly alleged was stated in terms sufficiently general to comprehend it in a fair and reasonable intendment."

Here, the essential elements of the charge were (a) Appellants took birds on October 22, 1949, and (b) by means of bait which had been distributed so as to lure them to the area. The fact that the birds may have been lured by virtue of the instinct of returning to an area where bait was present the previous day (actually present

a few hours before shooting began) [Tr. 179-181], *or* by its actual presence contemporaneous with the shooting, was immaterial so long as either situation was shown to have existed, *a fortiori,* where both situations were shown as here. Not unreasonable then was Instruction 19-A since it contemplated one of the mentioned means or modes of committing the offense charged.

That there is a distinction between the gist of the offense charged and the means or mode of committing it is clear. *U. S. v. Turley* (2 Cir.), 135 F. 2d 867, cert. den. *Byrne v. U. S.,* 320 U. S. 715, is a case in point. There defendants were indicted for transporting or causing to be transported in interstate commerce stolen securities. The Court charged that they might be convicted if they were organized to dispose of stolen securities, were willing to do so, and cared not where the property came from, either within or without the State. The theory was that by furnishing a market for such stolen property, the accused thereby caused bonds stolen in another State to be transported to New York as charged. The Appellate Court said this was a fair statement of such a rule set out in a previous case which they had decided. It was said that while the Trial Court could not make deductions or advance theories not warranted by the evidence, it could indicate that the offense charged might be committed in the manner stated.

It is apparent that in the last cited case, the Trial Court was merely citing a *means* of committing the offense. Such was the purport of Instruction 19-A in the case at hand. As in the case cited, the Trial Court was instructing on the

basis of what may be considered a fair statement of the rule of law pronounced in the *Cerritos Gun Club* case, *supra.* A review of that case does not indicate that this Court intended to enunciate a new and separate offense within the terms of the particular Regulation, but rather was stating a means of violating such Regulation.

Further, in considering the distinction between the gravamen of the offense charged and the means of committing it, see *Madsen v. U. S.* (10 Cir.), 165 F. 2d 507, and *Muncy v. U. S.* (8 Cir.), 96 F. 2d 332.

Even more important on this point is the case of *U. S. v. Krepper* (3 Cir.), 159 F. 2d 958, where it was held that a Trial Court may withdraw from the jury's consideration of an offense charged one of the alleged methods of committing it, and that such would not constitute a fatal amendment to the charge. This would appear to be logical authority for the case at hand where a reverse situation might be said to exist. See also, *U. S. v. Segelman* (W. D. Pa.), 86 Fed. Supp. 114; and see *Armour Packing Company v. U. S.*, 209 U. S. 56, 85, involving failure to charge the device by which the crime alleged was committed.

II.

In Any Event, Appellants Were Not Substantially Prejudiced by the Giving of Instruction 19-A.

As already stated, it is apparent by its opinion that the Court has, in effect, found a material variance between the Information and the attempted proof and Instruction 19-A given in connection therewith. It is submitted that even assuming the Information by a fair construction does not semantically support a proof of luring by the means designated in such Instruction, Appellants were not substantially prejudiced thereby; on an examination of the entire record, as is required by *Berger v. U. S.*, 295 U. S. 78, 82, it must be concluded that they were, in fact, sufficiently apprised of the elements of the charge. Cases hereinafter cited directly dealing with the giving of Instructions inconsistent with, contrary to and broadening the formal accusation will, it is believed, lead this Court to such conclusion. It will be apparent that many of the cases already cited, particularly those concerning the means or methods by which an offense may be committed as distinguished from the gravamen of the offense itself, are applicable in the following discussions. For that reason, they are not repeated.

First to be considered however, is the well known test of the sufficiency of an accusation where material variance is claimed by one convicted thereunder. As stated in *Mathews v. U. S.* (8 Cir.), 15 F. 2d 139, the test, briefly, is this: (a) was defendant mislead, and (b) will he be protected against future prosecution for the same act?

With regard to (a) of such test, included is the proposition that the defendant must be sufficiently advised of the charges against him so that he may have ample opportunity to prepare his defense and not be taken by surprise.

U. S. v. Bickford (9 Cir.), 168 F. 2d 26;
Pinella v. U. S. (4 Cir.), 140 F. 2d 271;
Meyers v. U. S. (2 Cir.), 3 F. 2d 379;
U. S. v. Remington (2 Cir.), 64 F. 2d 386.

The last cited case further states the rule that, with reference to (b) of such test, extrinsic evidence is later admissible to identify the crime with which defendant was previously charged; there, a Prohibition Agent had been charged with accepting a bribe on a certain date at certain premises, but the proof showed the premises were located at a completely different place. Likewise, in the case at hand, the actual taking or shooting of migratory waterfowl is the *sine qua non* of the offense. The luring, however achieved, must be in connection therewith. There was but one taking charged, namely—on October 22, 1949 [Tr. 452]. Proof of this would bar any subsequent prosecution for the same act.

> "In other words, if the Indictment is sufficient, evidence which meets its allegations and proves something more without proving an offense different from that which is charged, cannot make a variance between the probata and the allegata."
>
> *Goldberger v. U. S.* (3 Cir.), 4 F. 2d 10, 12.

See also, *U. S. v. Remington* (7 Cir.), 176 F. 2d 321, cert. den. 338 U. S. 893, rehear. den. 338 U. S. 940, cert. den. 340 U. S. 826, where defendants were charged with wilful evasion of income taxes by omitting from ordinary

income dividends received, but the proof showed that they failed to report money received from overceiling sales of whiskey. The Court there held that defendants were not surprised; that the gravamen was wilful intent to evade and defeat. In the case at hand, the proof of luring by means of bait present contemporaneous with actual shooting was, in part, established by evidence that the lure was present a few hours before the shooting [Tr. 179-181]; the same proof could establish violation by means of luring birds to the area up to just before the season opened, and then taking them on the opening of the season. Thus, the Appellants here could not have been surprised or mislead.

The case of *Hopper v. U. S., supra*, 142 F. 2d 181, also emphasized the above discussed rule regarding test of the sufficiency of an accusation, and is persuasive here because it also was a rehearing of a previous decision which had determined the particular Indictment to be insufficient. The Court there fully discussed the rule involved, and reversed its former decision.

Also to be noted is the general statement in *U. S. v. Rabinowitz* (2 Cir.), 176 F. 2d 732, reversed on other grounds, 339 U. S. 56, where the Court stated it is only necessary that the accused be well enough apprised of the crime charged to prepare his defense, which may be done by means other than the Indictment.

The attention of the Court is invited to the following decisions which covered situations where the Trial Court had by its Instructions confused, contradicted or broadened the charge made in the accusation, or had made reference to a violation other than that charged. Most of these decisions reflect the rules above discussed concerning mate-

rial variance, but go further and hold that there was no substantial prejudice resulting from the situations involved. All would seem applicable here.

In *Malatkofski v. U. S.* (1 Cir.), 179 F. 2d 905, the Indictment charged that the defendant unlawfully gave money to an employee of the United States, intending to influence him in the awarding of certain contracts. The evidence showed the employee did not award any contracts, but only made certain direct purchases of goods; the Court held this was not variance. However, the Trial Court had instructed that the defendant may be found guilty if the money was handed over as a gift *or* as a loan, if the requisite intent was found. A loan would be another and separate violation under the statute. In this regard the Court held that in any event, the point was unimportant because any variance was inconsequential; that the defendant could not be said to have suffered any prejudicial surprise, nor were his substantial rights affected in any other respect. It went on to say:

> "It is perfectly clear that whether the handing over of the money was as a gift or as a loan, Malatkofski cannot be prosecuted again for the crime of bribery incident to this transaction." (P. 917.)

The case of *U. S. v. Wodiska* (2 Cir.), 147 F. 2d 38, involved an Indictment charging concealment of assets in bankruptcy, namely money, from the Trustee in Bankruptcy. The Trial Court instructed that assets may include money owed to the bankrupt. This was assigned as error. The Appellate Court held such Instruction was correct as a general proposition, and although there was no allegation in the Indictment of the concealment of money owed, as such, it was impossible to understand how the appellant could have been prejudiced thereby.

In *U. S. v. Fleenor* (7 Cir.), 177 F. 2d 482, defendant was charged in two counts with violation of the White Slave Traffic Act, was convicted, and on appeal, conviction was affirmed. On a Motion to Vacate Judgment and Sentence under Section 2255 of Title 18, U. S. Code, available where the sentence imposed is in violation of the Constitution or laws of the United States, the Court held that the Indictment was legally sufficient and went on to say at page 484:

> "Defendant attempts to demonstrate the invalidity of the Indictment by calling attention to certain elements which the Court enumerated in its charge to the jury as constituting the offense charged. We have examined the Court's charge, and in some respects what the defendant asserts is true, but even so, *the validity of the charge contained in the Indictment is not dependent upon the Court's Instructions to the jury. A variance between the charges contained in the Indictment and the Court's Instructions to the jury might constitute error, which, like any other error committed by the Trial Court would be subject to review. But such error would not affect the defendant's constitutional rights or render the Judgment void.*" (Emphasis supplied.)

The Court said further that the errors complained of would not have been prejudicial even if they had been raised on a formal appeal.

In *Bullard v. U. S.* (4 Cir.), 245 Fed. 837, concerning a charge of unlawful distilling of spirits, to-wit, whiskey, the Trial Court gave an Instruction authorizing conviction on proof of distilled "rum, brandy or whiskey." This was claimed as error, but the conviction was affirmed.

In *Brickey v. U. S.* (8 Cir.), 123 F. 2d 341, the appellant had been convicted of making or causing to be made a false entry in the report of a bank insured by the Federal Deposit Insurance Corporation. As President of the bank, he was indicted along with another who had been cashier. The latter pleaded guilty. The proof showed that the cashier prepared the report and the President merely signed it. The Court instructed that appellant could be convicted under the Aiders and Abettors Statute. On appeal, this was claimed as error. It was clear, stated the Appellate Court, that appellant, being an officer of the bank, could be convicted as a principal, that he was so charged although there was no allegation that he aided and abetted the cashier. It then went on to say:

> "For this reason, it is said the Instruction permitted the jury to convict the appellant of a crime of which he was not charged. The Instruction was unnecessary, but entirely without prejudice to the appellant. It added no burden and required no prejudicial finding. The evidence warranted a conviction as principal under the Indictment as clearly without the Instruction as it did with it. Had he been indicted as an aider and abettor, he could have been convicted as a principal. * * *" (P. 346.)

In *Neill v. U. S.* (5 Cir.), 41 F. 2d 173, defendant, a postal clerk, was charged with converting money deposited in his hands to pay postage due stamps under his control and received in the execution of his office as such postal clerk. The Trial Court instructed the jury that if without

any special authority of the Postmaster and without any statute or regulation of the Post Office Department, a custom had grown up, including in the particular post office, for the clerk in charge of postage due mail to receive from patrons such deposits and purchase therewith postage due stamps, and with them pay postage due on mail matter of such patrons, this would give rise to a duty for such clerk to receive such money or deposits. The Appellate Court upheld the conviction, and said that whether the money did or did not come into his hands or under his control in the execution of his employment or office, he was not harmed by the Instruction as the uncontroverted evidence showed that if it did not thus come into his possession or under his control, it did or must have come into his control under color of his office, which latter the Court found within the meaning of the Indictment.

Also in connection with the giving of Instructions broadening the accusation, where the Appellate Court upheld conviction, see *Griffith v. U. S.* (7 Cir.), 261 Fed. 159, cert. den. 252 U. S. 577; also, *Weldon v. U. S.* (C. A. D. C.), 183 F. 2d 832, where the Indictment charged a violation of an Illinois statute concerning indecent acts with children, but the Court instructed on and defendant was convicted of, violation of a Sodomy Statute taken from Maryland law. The conviction was upheld. And see *U. S. v. Turley, supra,* 135 F. 2d 867.

The Court in its opinion, as the basis for its holding herein, has cited *Edgerton v. U. S.* (9 Cir.), 143 F. 2d 697.

It is submitted that this case is distinguishable from the one at hand. There, an Indictment was involved rather than an Information. That an Information, in any event, may be amended with less formality and procedure than an Indictment, is well settled. It has been held that one may be convicted on a count added by amendment to the Information even though no arraignment and plea were had on such additional count. (*Muncy v. U. S.* (4 Cir.), 289 Fed. 789; see also, *Frederick v. U. S.* (9 Cir.), 163 F. 2d 536.) In view of the *Muncy* case alone, this Court might well conclude that even if the Information here was amended by Instruction 19-A, to charge another offense, the conviction must stand.

But the *Edgerton* case may be distinguished further. There, an Instruction actually deleted from the Indictment certain allegations as to misrepresentations made by defendants in a scheme to defraud by use of United States mails. The effect was to strike out words limiting such misrepresentations and to broaden them considerably; and the Court regarded the procedure as placing undue emphasis by the Court upon such misrepresentations, possibly causing the jury to believe that the Court itself believed they had been made. This would seem scarcely comparable to the facts of the case at hand. The Appellants were charged with the taking of birds by means of luring. The Court by Instruction 19-A merely indicated one means by which that offense might be committed, or one situation where a violation might result; the evidence, in all events, was the same.

The Trial Court itself affirmatively felt that Instruction 19-A represented the law as pronounced by this Court, and regarded it as a desirable Instruction [Tr. 464]. It may be noted that Appellants failed at that time or at any time during the trial to specify, as the ground for their objection to such Instruction, that it constituted the charging of an additional offense, which they were required to do, *DuVall v. U. S.* (9 Cir.), 82 F. 2d 382.

However, it is submitted that upon the consideration of the entire record of this case, of the points and authorities above discussed, and the fullness and fairness with which all aspects of the case were tried, this Court should conclude no prejudicial error was committed.

WHEREFORE, Appellee respectfully prays that this Honorable Court grant this Petition for Rehearing and that the Judgment of Conviction herein, upon further consideration, be affirmed.

Respectfully submitted,

ERNEST A. TOLIN,
United States Attorney,

WALTER S. BINNS,
Chief Assistant U. S. Attorney,

NORMAN W. NEUKOM,
Assistant U. S. Attorney,
Chief Trial Assistant,

Attorneys for Appellee.

Certificate of Counsel.

I, counsel for the United States of America, Appellee in the above-entitled cause, do hereby certify that the aforegoing Petition for Rehearing of this cause, in our opinion, is well founded and is not interposed for delay.

NORMAN W. NEUKOM,

Assistant U. S. Attorney,
Chief Trial Assistant.

APPENDIX.

Opinion of the United States Court of Appeals.

United States Court of Appeals for the Ninth Circuit.

Edwin L. Carty, H. McCormick, Eugene Doud, James R. Doud, Vincent Doud, Raymond E. Farrell, James D. McCormick, Robert Maulhardt and Edward C. Maxwell, Appellants, vs. United States of America, Appellee. No. 12,590.

May 17, 1951.

Appeal from the United States District Court, Southern District of California, Central Division.

Before STEPHENS and ORR, Circuit Judges, and
FEE, District Judge

JAMES ALGER FEE, District Judge:

Appellants were tried upon an information charging that they did take, hunt and kill migratory game birds over baited ponds and areas by use of shelled grain as a lure, by a jury and convicted. They appeal. In their brief, they recite:

> "The appellants consist of farmers, businessmen and public officials who had either been born or resided for many years in and about the City of Oxnard, Ventura County, California. The appellant, Maxwell, an attorney, had been United States Commissioner for the District, President of the County Bar Association of Ventura County, and had served on the Draft Board. The appellant, Carty, at the time of the trial, was Mayor of the City of Oxnard, which position he had held for six years. He was Past President of the League of California Cities and of

the National Association of Municipal Legislators, and had an interest in conservation work for 30 years, having been president of many sportsmen's clubs, Ventura County Gun and Rod Club, the Southern Council of Wardens, Southern California Sportsmen, and State Sportsmen's Council. In addition, at the time of his trial he was a member of the California Fish and Game Commission, and was such a Commissioner on appointment of two governors. There was uncontradicted evidence of the excellent and good character of the appellants."

Besides this, appellants complain of two errors:

(1) Failure to give an instruction that, if the defendants had been entrapped by the officers, they should be acquitted; and

(2) Inclusion of an instruction that, if the baiting were done prior to the season, a conviction might follow if the birds were thus drawn to the area.

As to the first point, there was no evidence of entrapment. The Court did not err in refusing to give the requested instruction. The evidence does show that the defendants went to great extent to use their influence and the prestige of their social and political positions upon the game wardens, in order to obtain immunity from prosecution. But the jury convicted nevertheless.

The officers did not implant the idea of shooting ducks over a fed lake in the minds of defendants. It was not an original idea, but appellants thought it up as the evidence shows. The jury were entitled to find that there was shelled barley in front of the blinds which at that time and place constituted a lure to the birds. The jury could find

that each of appellants took birds by shooting over a fed lake. The jury could also have found from the evidence that each of appellants knew there was shelled grain which lured the birds at the time and place.

The only difficulty with this is that the agents of the government led the Court into error. They requested and the Court gave an instruction which reads:

> "You are instructed that the regulations concerning the baiting of migratory birds is violated whether the hunters had pursued the indirect method of baiting before the season opened so as to keep the birds in the hunting area to be shot after the season opens, whereupon the hunters may flush them as they walk or punt over the preserves, or by directly placing the grain or other feeds in front of the blinds or stands during the season."

If it be conceded that a possible interpretation of the statute would permit a charge of baiting before the season opened, so as to keep the birds in hunting area to be shot after the season opened,[1] in this case the instruction was erroneous. It was shown by the record that the area had been fed about ten days before with the knowledge and consent of game wardens. But the information made the specific charge that the birds were taken over "baited ponds and areas by means, aid and use of shelled grain." This charge could not be established by proof of a baiting before

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[1]Cerritos Gun Club vs. Hall, 9 Cir., 96 F. 2d 620, 624; *cf.* Cochrane vs. United States, 7 Cir., 92 F. 2d 623.

season if there were no shelled grain in the area contemporaneously with the shooting. Notwithstanding we believe the jury might have found defendants guilty of the charge as laid, this instruction amended the information and defendants were tried upon a charge different than that which they were called to defend by the language thereof. We cannot therefore speculate upon how much weight the jury may have given to the instruction. This was error superinduced by the agents of the government. Nor is this a technicality. The giving of the instruction constituted a flagrant abuse of due process.[2]

The cause is reversed and a new trial ordered.

(Endorsed): Opinion. Filed May 17, 1951. Paul P. O'Brien, Clerk.

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[2]See Edgerton vs. United States, 9 Cir., 143 F. 2d 697. "Conviction on a charge not made would be sheer denial of due process." De Jonge vs. Oregon, 299 U. S. 353, 362.

No. 12591

United States
Court of Appeals
For the Ninth Circuit.

JOHN H. FAHEY, et al.,

Appellants,

vs.

O'MELVENY & MYERS, W. I. GILBERT, JR., and RICHARD FITZPATRICK,

Appellees.

and

FEDERAL HOME LOAN BANK OF SAN FRANCISCO,

Appellant,

vs.

O'MELVENY & MYERS, W. I. GILBERT, JR., and RICHARD FITZPATRICK,

Appellees.

Transcript of Record
In Two Volumes
Volume I
(Pages 1 to 396)

**Appeal from the United States District Court,
Southern District of California,
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Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court of the United States in and for the Southern District of California, Central Division

Civil Action No. 5421-P.H.

PAUL MALLONEE, et al.,

Plaintiffs,

vs.

JOHN H. FAHEY, et al.,

Defendants.

Civil Action No. 5678-P.H.

FEDERAL HOME LOAN BANK OF LOS ANGELES,

Plaintiffs,

vs.

FEDERAL HOME LOAN BANK OF SAN FRANCISCO,

Defendants.

MEMORANDUM IN OPPOSITION TO MOTIONS FOR ORDERS DIRECTING PAYMENT OF ATTORNEYS' FEES ON ACCOUNT, AND REPAYMENT OF MONEYS ADVANCED, AND THE SUPPLEMENTS THERETO

Come now the defendants, the Home Loan Bank Board, William K. Divers, Chairman; J. Alston Adams, Member, and O. K. LaRoque, Member, of the Home Loan Bank Board, and John H. Fahey,

A. V. Ammann as Conservator for the Long Beach Federal Savings and Loan Association, and the Federal Savings and Loan Insurance Corporation, an instrumentality of the Government of the United States wholly owned by the United States, and without waiving their [9837] objections to the jurisdiction of this Court over their respective persons and without waiving their respective objections to the venue and other objections, but specifically reserving and asserting the same, respectfully submit the following memorandum of points and authorities and the attached affidavits in opposition to the Motion for Order Directing Payment of Attorneys' Fees on Account, to the Motion for Order Directing Payment of Moneys Heretofore Advanced by Shareholders Protective Committee, and to the supplements thereto filed by plaintiffs in the above-entitled Civil Action No. 5678-P.H.

I.

The Court Cannot Pay Fees or Expenses Out of San Francisco Bank Assets Because the Court Has No Jurisdiction Over the Subject Matter of the Actions.

A. The complaints seek to have the Court readjust Federal Home Loan Bank Districts, establish Federal Home Loan Banks, and remove a Conservator for a Federal savings and loan association.

These fees are sought by the attorneys for the plaintiffs in No. 5678, including the Federal Home Loan Bank of Los Angeles, hereinafter referred to

as the "Los Angeles Bank," in consideration of the services of these attorneys in the two consolidated cases entitled Mallonee v. Fahey, Civil Action No. 5421, and Federal Home Loan Bank of Los Angeles v. Federal Home Loan Bank of San Francisco, Civil Action No. 5678. The first of these actions began in May, 1946, as an action to remove the Conservator for the Long Beach Federal Savings and Loan Association, hereinafter referred to as the "Association," for declaratory relief that the appointment of the Conservator was void, and for an accounting. The plaintiffs were shareholders of the Association suing derivatively and the defendants included officials of the Government, the Conservator for the Association and the Association itself. The pleadings admit that no demand was made by the plaintiffs upon the directors of the Association to authorize the action in the Association's name. The answer of the Association was filed by its directors who joined the plaintiffs in its prosecution against the other [9838] defendants by filing a cross-claim. The Association also filed an action against the Los Angeles Bank and the Federal Home Loan Bank of San Francisco, hereinafter referred to as the "San Francisco Bank," seeking a declaratory judgment as to which Bank was in existence.

The Home Owners' Loan Act of 1933, pursuant to which the Conservator was appointed, was held unconstitutional by a three-judge court in September, 1946, in finding for the plaintiffs and the Association in Mallonee v. Fahey, No. 5421. The

Supreme Court reversed this judgment upon an appeal by the Government. Part of the services for which compensation is here sought by these attorneys is in connection with their effort to obtain an affirmance of this judgment of the three-judge court in Civil Action No. 5421.

However, this Court on January 23, 1948, ordered the Association returned to the control of the same persons by reasons of whose actions the Conservator in the first instance was appointed. This order of the Court was entered over the objections of the Home Loan Bank Board and the Government. It was also taken without any hearing on the merits of the controversy in Court or before an administrative agency.

Later, supplemental pleadings were filed in Mallonee v. Fahey, No. 5421, which sought the recovery of money damages against the San Francisco Bank and Government defendants.

Counsel were employed and the case of Federal Home Loan Bank of Los Angeles v. Federal Home Loan Bank of San Francisco, No. 5678, was instituted, after the dissolution of the Los Angeles Bank. Six of the more than one hundred and fifty member financial institutions of the former Los Angeles Bank joined as plaintiffs in bringing the action. There was filed a third party cross-claim in Mallonee v. Fahey seeking the same relief that was sought in Federal Home Loan Bank of Los Angeles v. Federal Home Loan Bank of San Francisco. The actions were consolidated by the Court over the objections of the Government.

The action of Federal Home Loan Bank of Los Angeles v. Federal Home Loan Bank of San Francisco, No. 5678, purports to be within the [9839] provisions of Section 1655 (formerly Section 118) of Title 28. The action was commenced in August, 1946, following the merger of the Los Angeles Bank into the Federal Home Loan Bank of Portland, hereinafter referred to as the "Portland Bank," the dissolution of the Los Angeles Bank, the change in name and location of the Portland Bank to San Francisco, and the combination of the Eleventh and Twelfth Federal Home Loan Bank Districts into one Eleventh District serving the entire area, all of which had been accomplished in March, 1946, pursuant to administrative orders of the Federal Home Loan Bank Administration, of which defendant Fahey was Commissioner. The Federal Home Loan Bank Administration has been succeeded by the Home Loan Bank Board. The plaintiffs in No. 5678, represented by the attorneys whose fees are sought in the motion here opposed, seek to redivide the Eleventh Federal Home Loan Bank District into two districts; to reestablish two Federal Home Loan Banks, a Federal Home Loan Bank at Los Angeles and a Federal Home Loan Bank at Portland; to dissolve the San Francisco Bank; to allocate the members of the San Francisco Bank between such Portland and Los Angeles Banks; to apportion the stock of the San Francisco Bank, a majority of which is owned by the United States Treasury, between such Portland and Los

Angeles Banks; and otherwise to accomplish certain governmental actions.

The attempt to bring the action within former Section 118 of Title 28 is made by alleging that the suit is to recover the property of the dissolved Los Angeles Bank. The six member financial institutions, also plaintiffs, in addition seek the recovery of deposits and assets, which the San Francisco Bank has repeatedly stated these plaintiffs are free to withdraw at will.

There has not yet been any trial on the merits of any phase of this litigation. Available administrative remedies have been avoided by plaintiffs in both actions, and the holding of administrative hearings has been opposed by the Association group. No administrative hearing has been asked by the plaintiffs in No. 5678.

The only purported service of process in either case on any of these [9840] defendants, except defendant Ammann, has been service by mail outside the State of California.

This conflict is clearly between a certain few financial institutions and the United States Government. The actions of which the plaintiffs in both Mallonee v. Fahey and Federal Home Loan Bank of Los Angeles v. Federal Home Loan Bank of San Francisco complain are the actions of the Government. It was the Government which appointed the Conservator for the Association. It was the Government which transferred the assets and liabilities of, and the memberships in, the Los Angeles Bank

to the Portland Bank; which caused the Portland Bank to become the San Francisco Bank; and which dissolved the Los Angeles Bank. The San Francisco Bank, as well as its two predecessors, is an instrumentality of the Government and the Government is the majority stockholder of the San Francisco Bank, as it always was of the Los Angeles and Portland Banks. It is the Home Loan Bank Board, a Government agency, that has full authority to establish the two banks, create a new district, and divide the San Francisco Bank's assets and membership.

The fact that this is a suit against the Government is recognized by the plaintiffs in both actions in that they name and have attempted to serve as defendants the members of the Home Loan Bank Board and the Home Loan Bank Board itself by mail outside California. The plaintiffs in Federal Home Loan Bank of Los Angeles v. Federal Home Loan Bank of San Francisco make no allegation that the Home Loan Bank Board or any of its members have or claim any interest or right of any nature in any of the property which ever has belonged to the dissolved Los Angeles Bank. The members of the Home Loan Bank Board and the Home Loan Bank Board itself have never asserted any interest in this property nor could that Board, or its members who are sued only in an official capacity, have any such interest. Clearly then the plaintiffs in serving these members and the Board by substituted service outside the State of Cali-

fornia are not undertaking to enforce any lien or cloud upon the title to real or personal property within the District. They are only recognizing that their conflict is with the Government, and that the relief they seek is [9841] governmental relief, complex administrative actions revising the reserve banking and supervisory system for savings and home financing institutions in the United States.

B. The dissolution, liquidation, and reorganization of the Federal Home Loan Banks are matters for administrative determination by the Home Loan Bank Board.

The Federal Home Loan Bank Act, as amended, provides:

> "Sec. 3. As soon as practicable the board shall divide the continental United States, Puerto Rico, the Virgin Islands, and the Territories of Alaska and Hawaii into not less than eight nor more than twelve districts. Such districts shall be apportioned with due regard to the convenience and customary course of business of the institutions eligible to and likely to subscribe for stock of a Federal Home Loan Bank to be formed under this Act, but no such district shall contain a fractional part of any State. The districts thus created may be readjusted and new districts may from time to time be created by the board, not to exceed twelve in all. Such districts shall be known as Federal Home Loan Bank districts and may be designated by number. As soon as practicable

the board shall establish, in each district, a Federal Home Loan Bank at such city as may be designated by the board. Its title shall include the name of the city at which it is established.

"Sec. 25. Each Federal Home Loan Bank shall have succession until dissolved by the board under this Act or by further Act of Congress.

"Sec. 26. Whenever the board finds that the efficient and economical accomplishment of the purposes of this Act will be aided by such action, and in accordance with such rules, regulations, and orders as the board may prescribe, any Federal Home Loan Bank may be liquidated or reorganized, and its stock paid off and retired in whole or in part in connection therewith after paying or making provision for the payment of its liabilities. In the case of any such liquidation or reorganization, any other Federal Home Loan Bank may, with the approval of the board, acquire assets of any such liquidated or reorganized bank and assume liabilities thereof, in whole or in part."

(12 U.S.C. 1423, 1445, and 1446.)

The Charters issued to the Los Angeles and Portland Banks each expressly provide:

"Sec. 27. This Bank shall have succession until dissolved by the Federal Home Loan Bank Board * * *."

The San Francisco Bank operates under the Charter of the Portland Bank, [9842] which Charter is unchanged except for the change of name.

C. These functions having been vested in the Executive Branch of the Government, the courts are precluded from usurping them.

Massachusetts v. Mellon,
262 U.S. 447;

Texas & Pacific Railway Company v. Abilene Cotton Oil Company, 204 U.S. 426, 51 L. ed. 553;

Myers vs. Bethlehem Shipbldg. Corp.,
303 U.S. 41, 82 L. ed. 638;

Macauley v. Waterman Steamship Corp.,
327 U.S. 540, 90 L. ed. 839;

Evans v. Superior Court,
96 P. 2d 107; appeal dismissed 309 U.S. 640, 84 L. ed. 995;

Gray v. Powell,
314 U.S. 402, 86 L. ed. 301:

"It is not the province of a court to absorb the administrative functions to such an extent that the executive or legislative agencies become mere fact-finding bodies deprived of the advantages of prompt and definite action. * * * Where as here a determination has been left to an administrative body, this delegation will be respected and the administrative conclusion left untouched."

Kirwan v. Murphy,
189 U.S. 36, 54, 47 L. ed. 698, 705:

"The administration of the public lands is vested in the Land Department, and its power in that regard cannot be divested by the fraudulent action of a subordinate officer, outside of his authority, and in violation of the statute. * * * The courts can neither correct nor make surveys. The power to do so is reposed in the political department of the government, and the Land Department, charged with the duty of surveying the public domain, must primarily determine what are public lands subject to survey and disposal under the public land laws. Possessed of the power, in general, its exercise of jurisdiction cannot be questioned by the courts before it has taken final action."

Adams v. Nagle,
303 U.S. 532, 82 L. ed. 999:

"In establishing the national banking system Congress has invested the Comptroller, an administrative officer, with jurisdiction to appoint a receiver after investigation and a finding that a bank has become insolvent. * * * It would be intolerable if the Comptroller's decision could be attacked collaterally in every suit by a receiver against the shareholders to collect the amount of the assessment. It is settled this cannot be done. It would be equally intolerable if stockholders as a class could call upon a

court to review the Comptroller's exercise of his discretion. For a court to entertain a suit for this purpose would be to render nugatory the functions Congress has confided in the Comptroller."

Interstate Commerce Com. v. Illinois C. R. Co., 215 U.S. 452, 54 L. ed. 281:

"The courts cannot, under the guise of exerting judicial power, usurp merely administrative functions by setting aside an order of the Interstate Commerce Commission within the scope of the power delegated to such Commission, upon the ground that such power was unwisely or inexpediently exercised." [9843]

Di Melia v. Bowles,
148 F. 2d 725 (1 C.C.A.):

"The Price Administrator was given the right under the law to determine on evidence whether regulations had been violated, and,—after proceedings which satisfied the requirements of justice,—to withdraw the permission given the dealer to handle this important wartime commodity, if the conditions had not been kept. The courts cannot review his decision, as on an appeal. Their authority does not go beyond ascertaining whether the proceedings satisfied the demands of due process and whether the action of the administrative body was without errors of law and appropriate under the authority conferred upon it."

Wannamaker v. Edisto Nat. Bank of Orangeburg,
62 F. 2d 696 (4 C.C.A.):

"We are dealing here with the extent of the power of the Comptroller to appoint a receiver for an insolvent bank * * * and it is settled that the determination as to the solvency of a national bank * * * is committed exclusively to the judgment and discretion of the Comptroller, and it is not subject to judicial review."

United States v. Hitchcock,
190 U. S. 316, 47 L. ed. 1074:

"Congress has constituted the Land Department, under the supervision and control of the Secretary of the Interior, a special tribunal with judicial functions, to which is confided the execution of the laws which regulate the purchase, selling, and care and disposition of the public lands. * * * Whether he decided right or wrong, is not the question. Having jurisdiction to decide at all, he had necessarily jurisdiction, and it was his duty to decide as he thought the law was, and the courts have no power whatever under those circumstances to review his determination. * * * If this writ were granted we would require the Secretary of the Interior to repudiate and disaffirm a decision which he regarded it his duty to make in the exercise of that judgment which is re-

posed in him by law, and we should require him to come to a determination upon the issues involved directly opposite to that which he had reached, and which the law conferred upon him the jurisdiction to make. * * * The responsibility as well as the power rests with the Secretary, uncontrolled by the courts."

D. Indispensable parties are not joined.

The members of the Home Loan Bank Board, and the Board, are indispensable parties to the action.

Williams v. Fanning,
332 U. S. 490;

Daggs v. Klein,
169 F. 2d 174, cert. denied, 335 U. S. 908;

American Communications Assn. v. Schauffler,
80 F. Supp. 400.

The plaintiffs have recognized this indispensability by undertaking to serve the members and the Board as defendants. However, suit cannot be maintained in the State of California against the members of the Home Loan Bank Board, or against the Board, because the members of the Board, and the Board, are official residents [9844] of the District of Columbia.

Title 28 U.S.C., Section 1391;
Butterworth v. Hill,
114 U.S. 128;

Scientific Mfg. Co. v. Walker,
40 F. Supp. 465;

Robertson v. Railroad Labor Board,
268 U.S. 619;

Transcontinental and Western Air v. Farley,
71 F. 2d 288;

Hartmann v. Federal Reserve Bank of Philadelphia,
55 F. Supp. 801.

Further, the only purported service of process on the members of the Board, or on the Board, has been service by mail in the District of Columbia, which is not effective.

Rule 4, F.R.C.P.

Substituted service cannot be justified under Section 1655 (formerly 118) of Title 28.

There can be no substituted service under this section on any defendant who claims or asserts no interest in the property.

Rainbow Rubber Co. v. Holtite Mfg. Co.,
20 F. Supp. 913, 916:

"* * * There is a further indispensable condition to the jurisdiction over absent parties under this section, and that is, that the absent party must in fact be an adverse party; that is to say, that the absent party must have made

an express or implied assertion of adverse ownership or encumbrance. * * *"

The members of the Home Loan Bank Board, individually or collectively, do not have, claim or assert, and never have had, claimed or asserted, any interest of any nature in any of the property that ever belonged to the Federal Home Loan Bank of Los Angeles, Federal Home Loan Bank of Portland, or the Federal Home Loan Bank of San Francisco, nor does or ever did the Home Loan Bank Board itself, nor does or ever did the Federal Home Loan Bank Administration or John H. Fahey, individually or as Federal Home Loan Bank Commissioner, have or assert any such interest. For this reason, they cannot be served under Section 1655. On the other hand, the members of the Home Loan Bank Board are indispensable parties to the action, as above set forth, because the reestablishment of the Los Angeles Bank is a prerequisite to its acquisition of any property, and only the Home Loan Bank Board can reestablish a Home Loan Bank at Los Angeles and divide the Eleventh Federal Home Loan Bank District.

Further, the action itself is not an action within Section 1655, or former Section 118, of [9845] Title 25.

Ladew v. Tennessee Copper Co.,
218 U. S. 357;

Kansas Gas & Electric Co. v. Wichita Natural Gas Co.,
266 F. 614;

General Investment Co. v. Lake Shore & M.S.R. Co.,
260 U. S. 261;

Appalachian Electric Power Co. v. Smith,
67 F. 2d 451; cert. denied 291 U. S. 674:

"* * * The defendants are asserting no rights under the orders in question and have no personal interest in them. The interest is in the public represented by the government of the United States. The United States has not been made a party and has not consented to be sued in such a case; and yet it is well settled that in a suit to remove a cloud or quiet title the adverse claimant is a necessary party to the suit. Wood v. Phillips (C.C.A. 4th) 50 F. (2d) 714, 717; 5 R.C.L. 669, and cases cited. To grant relief against the defendants here would amount to nothing. It would not be binding upon the United States or even upon the Power Commission."

E. No claim is stated by plaintiffs upon which relief can be granted.

The action purports to seek to quiet the title of a dissolved agency of the United States to assets it once had. There is no claim that any member financial institutions suffered any loss by the merger and dissolution, and in fact none did suffer.

F. Attorneys' fees cannot be paid out of a corporation's assets when the Court has no jurisdiction, or when indispensable parties are absent.

Fryer v. Weakley,
(C.C.A. Mo. 1919), 261 F. 509.

The fact that the Court has seized property of the San Francisco Bank does not authorize payments therefrom.

Hawes v. First Nat. Bank,
229 F. 51:

"* * * Courts may not seize property without jurisdiction, and then claim jurisdiction over the property because it is in the possession of the court."

II.

The action is not for the benefit of the San Francisco Bank, or of the Los Angeles Bank stockholders.

The action cannot be successful for the reasons set forth above, and also because the facts are as stated in the pleadings of these defendants and as set forth in the attached affidavits. Neither can any allowance to the plaintiffs be based upon any prospect of a conclusion of the litigation through compromise and settlement for the reason that there are no pending negotiations for compromise or settlement of this litigation. Accordingly, no allowance of attorney's fees can [9846] be granted.

Hobbs v. McLean,
117 U.S. 567, 582;

Sprague v. Ticonic National Bank,
307 U.S. 161;

McCourt v. Singers-Bigger,
145 F. 103, 114.

Even if the suit were successful, it would benefit neither the Bank nor the former Los Angeles Bank stockholders. There is no allegation that a share of stock in the Federal Home Loan Bank of San Francisco immediately following the merger was not equal in value to a share of stock in the Los Angeles Bank, or that any financial loss to any stockholder has resulted from the merger, nor has there been any such loss. There is no allegation that the prayers of the plaintiffs, if granted, would benefit financially the members of the San Francisco Bank, out of whose assets these attorneys seek payment of their fees, or even the former members of the dissolved Los Angeles Bank, nor would there be in fact any such benefit. On the contrary, this action has only caused outlays of the San Francisco Bank's funds and delayed the effectuation of economies in its operations.

The actions of the Government which are attacked in these suits are in the public interest and in the interest of all member institutions, and were required to be taken by statutes of the United States. This is not a suit to preserve or protect property.

And the Government is and always has been the majority stockholder in the San Francisco Bank and was such at all times in the Los Angeles and Portland Banks.

But attorneys' fees cannot be allowed out of as-

sets of the San Francisco Bank when neither the San Francisco Bank nor the Los Angeles Bank benefits, or when only one small group of minority stockholders benefits, or where attorneys represent individual stockholders and not the Bank, or to secure management and control for a minority group.

Wolfes v. Paragon Refining Co.,
74 F. 2d 193;

Hartman v. Oatman Gold Mining & Milling Co.,
(Ariz.), 198 P. 717;

Hildreth v. Western Realty Co.,
(N.D.), 242 N.W. 679, 684;

Ham v. Norwood,
(N.C.), 147 S.E. 291;

Joyce v. Congdon,
(Wash.), 195 P. 29;

Tefft v. Schaefer,
(Wash.), 239 P. 837, 1119;

Annotation, 152 A.L.R. 919. [9847]
Hempstead v. Meadville Theological School
(Pa.), 134 A. 103, 105, 49 A.L.R. 1145, 1149:

"* * * But the attempted transfer of property to the Illinois corporation, if it can be so called, to be used for the same purpose, would not be a dissipation of the property in any sense of the word. The transfer might have been to its very great benefit, certainly not to

its advantage. The purpose of the old school and the trust created thereunder could have been carried on as effectively under that arrangement as under the one which was ordered by our prior decision. We so state to elucidate the question of the purpose of that and this litigation. Its effect was to control the managerial acts of the trustees. It was not to preserve property or a fund, and consequently under no stretch of our law could it be brought within the scope of the cases allowing counsel fees. * * *"

Nor did any services of these attorneys in connection with the action to remove the Conservator for the Association entitle them to payment out of the portion, if any, of the impounded assets that belongs to the Association.

Apart from the claims for unestablished damages, which were never suffered and in which phase these attorneys have not stated they assisted the Association, the controversy over the conservatorship is one over the right to corporate office, in connection with which fees and costs cannot be allowed against the corporation.

Burley Tobacco Co. v. Vest
(Ky.), 178 S.W. 1102

In any event the Association has benefited from the appointment of the Conservator, while the interlocutory order of this Court purporting to remove the Conservator is prejudicial to the interests of

the Association, the public, and the Government, should be vacated, and is without force or effect in law. In addition, these attorneys have not purported to represent the Association.

III.

This is not a case where plaintiffs would be precluded from presenting their case if fees were not allowed.

The six financial institutions, former members of the Los Angeles Bank, [9848] that join as plaintiffs in No. 5678, have total assets of $95,581,267.00.

Roster of Savings and Loan Associations, 1949, California Savings and Loan League.

They can pay their own attorneys and expenses.

JAMES M. CARTER,
United States Attorney.

ARLINE MARTIN,
Assistant U. S. Attorney.

By /s/ ARLINE MARTIN,
Assistant U. S. Attorney, Attorneys for Home Loan Bank Board, William K. Divers, Chairman; J. Alston Adams, Member, and O. K. LaRoque, Member, of the Home Loan Bank Board; John H. Fahey, A. V. Ammann as Conservator for the Long Beach Federal Savings and Loan Association, and Federal Savings and Loan Insurance Corporation.

[Endorsed]: Filed September 23, 1949.

MINUTE ORDER OF MONDAY, DEC. 19, 1949.

[Title of Cause.]

Hall

For hearing (1) on report of parties herein on progress made in re negotiations for settlement; (2) on report of Ronald Walker, Special Master herein, as to how the inspection of the San Francisco Bank is progressing, pursuant to an order therefor granted Dec. 8, 1948; (3) on Order to Show Cause directed to the Federal Home Loan Bank of San Francisco, sometimes known as the Federal Home Loan Bank of Portland, and to the Federal Home Loan Bank of Los Angeles, and to all of the 300 financial institutions, the purported directors and officers thereof, and the former directors and officers of said purported San Francisco Bank, why the relief prayed for in the motion of this moving party for an order for the dissolution of the San Francisco Bank should not be granted, pursuant to notice and order therefor signed and filed July 6, 1948; (4) on motion of defendant and cross-defendant Federal Home Loan Bank of San Francisco, and the cross-defendants Wm. A. Davis and Gerritt Vander Ende, sued in this action individually, and as a director and/or officer of the Federal Home Loan Bank of San Francisco, etc., for a Summary Judgment in favor of said cross-defendants and against the cross-claimant Long Beach Federal Savings & Loan Assoc., pursuant to notice

thereof filed July 30, 1948; (5) on motion of defendants C. N. Boynton, et al., cross-defendants, for a Summary Judgment, the First Amended and Supplemental Complaint of plaintiffs and the Amended Cross-Claim and Supplemental Cross-claim of defendant Long Beach Federal Savings & Loan Assoc., pursuant to notice thereof filed July 30, 1948;

Wyckoff Westover, Esq., appearing as counsel for Plaintiffs Shareholder Members' Protective Committee of Long Beach Federal Savings & Loan Assoc.; W. I. Gilbert, Jr., Esq., appearing as counsel for First Federal Savings & Loan Assoc. of Wilmington; Chas. K. Chapman, Esq., appearing as counsel for defendant [13484] and cross-claimant Long Beach Federal Savings & Loan Assoc.; Raymond Tremaine, Esq., appearing as counsel for Robert H. Wallis; John Whyte, Esq., appearing as counsel for Federal Home Loan Bank of Los Angeles; Sylvester Hoffman, Esq., appearing as counsel for Federal Home Loan Bank of S. F.; and Paul Fitting, Ass't U. S. Att'y, appearing as counsel for defendants Fahey, Ammann, and Federal Home Loan Bank Board.

Court orders cause continued to Jan. 3, 1950, 10 a.m., for the proceedings as herein set [13485] forth.

MINUTE ORDER MONDAY, FEB. 27, 1950

[Title of Cause.]

Hall

For hearing on (1) motion of plaintiffs for order directing payment of attorneys' fees on account filed Jan. 6, 1949, and supplement filed on July 8, 1949, 2 p.m.; (2) motion of First Federal Savings & Loan Assoc. of Wilmington for order directing payment of attorneys' fees on account and costs, filed [13923] Feb. 10, 1950, 2 p.m.; (3) motion of plaintiff (5678) and defendant, third-party defendant, cross-claimant and cross-defendant (5421) Federal Home Loan Bank of Los Angeles, for order directing repayment of moneys heretofore advanced by Shareholders' Protective Committee, filed Jan. 6, 1949, and a supplement thereto filed on July 8, 1949, 2 p.m.; and (4) motion of defendant, third-party plaintiff and cross-claimant Long Beach Federal Savings & Loan Assoc. for order to accept the second supplemental deposit in Registry of Court of the disputed premium claimed to be due on Deposit Ins. filed Feb. 13, 1950;

Wyckoff Westover, Esq., appearing as counsel for plaintiffs and Shareholders' Protective Committee; W. I. Gilbert, Jr., Esq., appearing as counsel for First Federal Savings & Loan Assoc., Wilmington; Chas. K. Chapman, Esq., appearing as counsel for defendant Long Beach Federal Savings & Loan Assoc.; Lyman B. Sutter, Esq., appearing as counsel for Title Service Co.; Raymond Tremaine, appearing

as counsel for defendant Robert H. Wallis; Richard Fitzpatrick, Pierce Works, John Whyte, Paul Fussell, Esqs.., appearing as counsel for Federal Home Loan Bank of Los Angeles; Irving Bishop, Verne Dusenbery, and Phillip N. Angell, Esqs., appearing as counsel for defendants Federal Home Loan Bank of San Francisco; Paul Fitting, Ass't U. S. Att'y, and Wm. F. McKenna, Ass't Gen'l counsel, appearing as counsel for Federal Home Loan Bank Board; John H. Fahey, and A. V. Ammann; Donald Macguineas, Esq., Dep't of Justice, appearing as counsel for Fed. Home Loan Bank Bd.;

Re Item 4: Court hears argument. Objections are denied and motion for order to accept second supplemental deposit in Registry of the Court is granted.

Re Item 1: Filed response of plaintiffs Mallonnee, et al., to applications for attorneys' fees; filed answer and opposition of Federal Home Loan Bank of San Francisco to application for attorneys' fees; filed affidavit of Irving Bogardus in opposition to application for attorneys' fees;

Witness for petitioner Federal Home Loan Bank of Los Angeles is called, sworn, and testifies, and eight exhibits are filed, marked for ident., [13924] and admitted in evidence for petitioner. Five exhibits are filed, marked for ident., and admitted in evidence for opposition.

It is ordered that all exhibits, except No. 2-27-50-5, 2-27-50-6, and 2-27-50-8 be copied in reporter's transcript.

It is ordered that the Federal Home Loan Bank of San Francisco and plaintiffs Mallonee, et al., are allowed to Feb. 28, 1950, to file affidavits or other exhibits in opposition to motion for attorneys' fees, and that petitioners Federal Home Loan Bank of Los Angeles are allowed to Feb. 29, 1950, to file further affidavits or other exhibits; hearing is continued to Feb. 28, 1950.

Re Item 2: Filed affidavit of Chas. Berry by petitioner First Federal Savings & Loan Assoc. of Wilmington, by counsel W. I. Gilbert.

Five witnesses are called, sworn, and testify for petitioner.

Hearing is continued to Feb. 28, 1950, 10 a.m.

Re Item 3: Hearing is continued to Feb. 28, 1950, 10 a.m. [13925]

Court adjourns.

[Title of District Court and Cause.]

MOTION FOR SUBSTITUTION OF PARTIES PLAINTIFF DUE TO DEATH, (RULE 25 F. R. C. P.)

Come Now, the Plaintiffs Flora E. Mallonee, Mabel E. Fergus, and Winnie Bucklin, the presently constituted Shareholder Members Protective Committee of the Long Beach Federal Savings and Loan Association, in the above-entitled action, and make this, [14044] their Motion, that the Court make its Order substituting Flora E. Mallonee in the place and stead of Paul L. Mallonee, deceased;

and Mabel E. Fergus, in the place and stead of C. H. Newhouse, deceased; as parties plaintiff in the above-entitled action.

This Motion is made upon the following grounds:

1. That the above-entitled litigation was instituted on May 27th, 1946, by Paul L. Mallonee, Winnie Bucklin, and C. H. Newhouse, as a class action for and on behalf of the approximately 16,000 shareholder members of the Long Beach Federal Savings and Loan Association; and

2. That said Paul L. Mallonee, Winnie Bucklin and C. H. Newhouse, were a duly constituted Shareholder Members Protective Committee, duly licensed by the Department of Investments, of the State of California, Division of Corporations, by license number 80282-L.A.; and

3. That on May 19th, 1948, C. H. Newhouse passed away in the City of Long Beach, County of Los Angeles, State of California; and

4. That thereafter Mabel E. Fergus was duly substituted as a member of said Shareholder Members Protective Committee, in the place and stead of C. H. Newhouse, deceased; and

5. That thereafter, application for renewal of said license of said Shareholder Members Protective Committee was duly filed with the Department of Investments, of the State of California, Division of Corporations, requesting that said license number 80282-L.A. be renewed in the name of the new committee, to wit, Paul L. Mallonee, Winnie Bucklin, and Mabel E. Fergus; and pursuant to said renewal application, said license number 80282-

L.A. was duly and regularly renewed as of January 1st, 1949, in the name of "Paul L. Mallonee, Winnie Bucklin, and Mabel E. Fergus, Stockholders' Protective Committee for shares of Long Beach Federal Savings and Loan Association"; [14045] and

6. That on June 3, 1949, Paul L. Mallonee passed away in the City of Long Beach, County of Los Angeles, State of California; and

7. That thereafter, his widow Flora E. Mallonee, was duly and regularly substituted as a member of said Shareholder Members Protective Committee, in the place and stead of said Paul L. Mallonee, her deceased husband; and

8. That thereafter, application for renewal of said license of said Shareholder Members Protective Committee was duly filed with the Department of Investments, of the State of California, Division of Corporations, requesting that said license number 80282-L.A. be renewed in the name of Flora E. Mallonee, Winnie Bucklin, and Mabel E. Fergus; and pursuant to said renewal application, said license number 80282-L.A. was duly and regularly renewed as of January 1st, 1950, in the name of "Mrs. Flora E. Mallonee, Winnie Bucklin and Mabel E. Fergus, Stockholders' Protective Committee for shares of Long Beach Federal Savings and Loan Association"; and

9. That said litigation is a class action continuing for and on behalf of all the approximately

16,000 shareholder members of the Long Beach Federal Savings and Loan Association; and

10. That this motion is based upon all the pleadings, papers, files and documents in the above-entitled action, and upon the Notice of Motion, Affidavit, and Memorandum of Points and Authorities filed herewith.

Wherefore, your affiant respectfully requests that Flora E. Mallonee, and Mabel E. Fergus be substituted as parties plaintiff in place and stead of Paul Mallonee, deceased, and C. H. Newhouse, deceased, respectively, and that said Flora E. Mallonee, Winnie Bucklin and Mabel E. Fergus, as the Shareholder Members [14046] Protective Committee of the Long Beach Federal Savings and Loan Association, be recognized henceforth as the plaintiffs in the above-entitled class litigation.

Dated at Los Angeles, this 13th day of March, 1950.

WESTOVER & SMITH,

By /s/ WYCKOFF WESTOVER,

Attorney for Plaintiffs, Shareholder Members Protective Committee of the Long Beach Federal Savings and Loan Association

State of California,
County of Los Angeles—ss.

Flora E. Mallonee, being first duly sworn, says:

That she is the Chairman of the Shareholder Members Protective Committee of the Long Beach

Federal Savings and Loan Association, the plaintiffs in the above-entitled action, and is authorized to make this verification for and on behalf of said committee; that she has read the foregoing Motion for Substitution of Parties Plaintiff Due to Death, (Rule 25 F.R.C.P.), and knows the contents thereof; that the same is true of her own knowledge, except as to those matters which are therein stated upon information or belief, and as to those matters, she believes them to be true.

/s/ FLORA E. MALLONEE.

Subscribed and sworn to before me this 13th day of March, 1950.

MARGARET O. SHALLIS.
Notary Public in and for Said
County and State. [14047]

Memorandum of Points and Authorities

If a party dies and the claim is not thereby extinguished, the Court may order substitution of the proper parties.

Rule 25(a) Federal Rules of Civil Procedure.

Respectfully submitted,

WESTOVER & SMITH,

By /s/ WYCKOFF WESTOVER,
Attorney for Plaintiffs, Shareholder Members Protective Committee of the Long Beach Federal Savings and Loan Association. [14048]

[Title of District Court and Cause.]

AFFIDAVIT OF FLORA E. MALLONEE, IN RE: MOTION TO SUBSTITUTE PARTIES PLAINTIFF

State of California,
County of Los Angeles—ss.

Flora E. Mallonee, sometimes known as Mrs. Paul Mallonee, being first duly sworn, deposes and says: [14049]

1. That she is the widow of Paul Mallonee, who died at Long Beach, California, in the County of Los Angeles, State of California, on June 3rd, 1949.

2. That your affiant was a friend of C. H. Newhouse during his lifetime.

3. That C. H. Newhouse was the same person who was a member of the Shareholder Members' Protective Committee of the Long Beach Federal Savings and Loan Association, one of the original plaintiffs in the above-entitled litigation.

4. That Mr. C. H. Newhouse passed away on May 19, 1948, in the City of Long Beach, County of Los Angeles, State of California.

5. That your affiant was duly and regularly elected a member of said Shareholder Members' Protective Committee of the Long Beach Federal Savings and Loan Association in place and stead of her deceased husband, Paul Mallonee.

6. That Mabel E. Fergus has been duly and

regularly elected to be a member of the Shareholder Members Protective Committee of the Long Beach Federal Savings and Loan Association in place and stead of C. H. Newhouse, deceased.

7. That said Shareholder Members Protective Committee of the Long Beach Federal Savings and Loan Association, as presently constituted, consists of Flora E. Mallonee, Winnie Bucklin, and Mabel E. Fergus.

8. That each of the members of said Shareholder Members Protective Committee have expressly consented to act as members of said Shareholder Members Protective Committee and have been so acting and have and do expressly consent to be substituted as parties plaintiff in the above-entitled litigation.

9. That said Shareholder Members Protective Committee has received a license so to act from the Department of Investments, Division of Corporations, of the State of California, dated [14050] January 1st, 1950, file number 80282-L.A.

10. That the above-entitled litigation, Mallonee, et al., vs. Fahey, et al., No. 5421-P.H., and consolidated and related cases in the District Court of the United States, Southern District of California, Central Division, and elsewhere, is still continuing, not yet completely decided or determined.

Wherefore, your affiant respectfully requests that Flora E. Mallonee, and Mabel E. Fergus be substituted as parties plaintiff in place and stead of Paul Mallonee, deceased, and C. H. Newhouse, de-

ceased, respectively, and that said Flora E. Mallonee, Winnie Bucklin and Mabel E. Fergus, as the Shareholder Members Protective Committee of the Long Beach Federal Savings and Loan Association, be recognized henceforth as the plaintiffs in the above-entitled class litigation.

/s/ FLORA E. MALLONEE.

Subscribed and sworn to before me this 13th day of March, 1950.

[Seal] /s/ MARGARET O. SHALLIS,
Notary Public in and for
Said County and State.

[Endorsed]: Filed March 14, 1950. [14051]

[Title of District Court and Cause.]

NOTICE OF MOTION FOR SUBSTITUTION OF PARTIES PLAINTIFF UNDER RULE 25, (F. R. C. P.) [14052]

To: The defendant, and cross-defendant, John H. Fahey, individually and as former Chairman of the Federal Home Loan Bank Board, and in his representative capacity as Federal Home Loan Bank Commissioner; and

To: The defendant, and cross-defendant, A. V. Ammann, individually, and as former purported conservator of the Long Beach Federal Savings and Loan Association;

To: The defendant, and cross-defendant, George K. Bramley;

To: The defendant and cross-defendant, the present Home Loan Bank Board, and to the individual defendant members thereof, William K. Divers, its Chairman; J. Alston Adams, a member, and O. K. LaRoque, a member, as defendants, in their representative capacities;

To: The defendant and cross-defendant Federal Savings and Loan Insurance Corporation, and to their attorneys of record:

United States Attorneys' Office, at Los Angeles, California; and

Honorable Ernest A. Tolin, Acting United States Attorney; and

Paul Fitting, Assistant United States Attorney; and

Donald B. MacGuineas, Attorney in the Department of Justice; and

William F. McKenna, Assistant Counsel, Home Loan Bank Board; 600 Federal Building, Los Angeles, California; and

To: The defendant and cross-defendant, Federal Home Loan Bank of Portland, sometimes known and referred to as the Federal Home [14057] Loan Bank of San Francisco, and to the defendants, and cross-defendants, the former and present officers and members of its Board of Directors, both in their individual and in their representative capacities, and to their attorneys of record:

Sylvester Hoffman and Irving G. Bishop, Esqs., Attorneys-at-Law, 215 W. 5th Street, Los Angeles 13, California;

Philip H. Angell, Esq., Attorney-at-Law, Balboa Building, San Francisco 5, California;

Verne Dusenbery, Esq., Attorney-at-Law, 911 Spalding Building, Portland 4, Oregon.

To: The defendant and cross-defendant Roy E. Hegg, and to his attorney of record:

F. Henry NeCasek, Esq., Attorney-at-Law, 3233 E. Anaheim Street, Long Beach 4, California.

To: The defendants and cross-claimant Federal Home Loan Bank of Los Angeles, and plaintiffs in No. 5678-P.H., Coast Federal Savings & Loan Association, Standard Federal Savings & Loan Association, Central Building & Loan Association, State Savings & Loan Association, and Los Angeles American Savings & Loan Association, and to their attorneys of record:

O'Melveny and Myers and Paul Fussell, Attorneys-at-Law, 500 Title Insurance Building, 433 South Spring Street, Los Angeles 13, California; and

Richard FitzPatrick, Esq., Attorney-at-Law, 1400 Chapman Building, 756 South Broadway, Los Angeles 14, California.

To: Plaintiff in Civil Action No. 5678-P.H., First Federal Savings and Loan Association of Wilmington, and to its attorney of record:

W. I. Gilbert, Jr., Attorney-at-Law, 939 Rowan Building, Los Angeles 13, California; [14058]

To: The defendants and cross-defendants, Pioneer Investors Savings and Loan Association, Home Mutual Savings and Loan Association, California Savings and Loan Company, Thrift Federal Savings and Loan Association, San Francisco Federal Savings and Loan Association, Community Savings and Loan Association, Oakland Federal Savings and Loan Association, Citizens' Federal Savings and Loan Association, Berkeley Guarantee Savings and Loan Association, and Golden West Savings and Loan Association, and to the defendant officers and directors of each of said defendant Associations, and to their attorneys of record:

Albert A. Rosenshine, and James E. Burns, Esqs., Attorneys-at-Law, 111 Sutter Street, San Francisco 4, California; and

Charles Dal Sooy, Esq., Attorney-at-Law, 220 Montgomery Street, San Francisco 4, California; and

Alden Ames, Esq., Attorney-at-Law, 435 Russ Building, 235 Montgomery Street, San Francisco 4, California.

To: The defendants and cross-defendants, Harold Lee Newendorp and Charles E. Bradley, and to their attorneys of record:

Linnell & Smith, Esqs., Attorneys-at-Law, 402 Jergins Trust Building, Long Beach 2, California.

To: The Land Title Insurance Company, defendant and cross-defendant, and to its attorney of record:

Robert A. Moffitt, Esq., Attorney-at-Law, 11196 Long Beach Boulevard, Lynwood, California.

To: The defendant and cross-defendant, Home Indemnity Company, and to its Attorneys-of record:

Thomas F. Menzies & Harold L. Watt, Esqs., 1017 Rowan Building, 458 South Spring Street, Los Angeles 13, California; [14059]

To: George Turner, defendant and cross-claimant in interpleader, and to his attorney of record:

F. Henry NeCasek, Esq., Attorney-at-Law, 3233 East Anaheim Street, Long Beach 4, California.

To: Title Service Company, defendant and cross-claimant in interpleader, and to its attorney of record:

Lyman B. Sutter, Esq., Attorney-at-Law, 512 Jergins Trust Building, Long Beach 2, California.

To: Robert H. Wallis, Esq., defendant and cross-claimant in interpleader, and to his attorney of record:

Raymond Tremaine, Esq., Attorney-at-Law, 210 West 7th Street, Los Angeles 14, California.

To: Long Beach Federal Savings and Loan Association, third-party plaintiff and cross-claimant, and to its attorney of record:

Charles K. Chapman, Esq., Attorney-at-Law, Ocean Center Building, Long Beach 2, California.

You, and Each of You, Will Please Take Notice, that the plaintiffs will, on Monday, the 27th day of March, 1950, at the hour of 10 o'clock a.m., or as soon thereafter as counsel may be heard, make a motion in Court Room No. 1 of the Honorable

Peirson M. Hall, United States District Judge, in the United States Court House and Post Office Building, Los Angeles, California, as follows, to wit:

That the Court make its order that the present parties plaintiff, the present Shareholder Members Protective Committee, be substituted as parties plaintiff in the above-entitled action No. 5421-P.H., suing as representatives of a class for and [14060] on behalf of all of the Shareholder Members of the Long Beach Federal Savings and Loan Association, plaintiffs, in place and stead of Paul Mallonee, deceased, and C. H. Newhouse, deceased.

Said motion will be based upon all the pleadings, papers, files, documents, and records in the above-entitled action and upon this notice of motion, and motion, including memorandum of points and authorities, and the affidavit of Flora E. Mallonee, thereunto attached.

Dated: March 13th, 1950.

WESTOVER & SMITH,

By /s/ WYCKOFF WESTOVER,

Attorney for Plaintiffs, Shareholder Members Protective Committee of the Long Beach Federal Savings and Loan Association.

[Endorsed]: Filed March 14, 1950. [14061]

[Title of District Court and Cause.]

AFFIDVAVIT OF SERVICE BY MAIL

State of California,
County of Los Angeles—ss.

Margaret O. Shallis, being first duly sworn, deposes and says:

That affiant is a citizen of the United States, a resident of the County of Los Angeles; that affiant is over the age of eighteen years and is not a party to the within and above-entitled action; that affiant's business address is 348 East 4th Street, [14073] Long Beach, California; that on the 13th day of March, 1950, affiant served copies of:

> Notice of Motion for Substitution of Parties; Plaintiff (Under Rule 25, F.R.C.P.); and
>
> Motion for Substitution of Parties Plaintiff Due to Death, (Rule 25, F.R.C.P.) and Points and Authorities and Affidavit in Support Thereof,

upon the following parties to the above-entitled action, to the attorneys of record of said parties at the office address of said attorneys as follows:

To: Ernest A. Tolin, Acting U. S. Attorney; Paul Fitting, Assistant U. S. Attorney; Donald B. MacGuineas, Attorney in the Department of Justice, and William F. McKenna, Assistant Counsel, Home Loan Bank Board, 600 Federal Building, Los Angeles, California, Attorneys for defendants John H.

Fahey, A. V. Ammann, George K. Bramley, Home Loan Bank Board, et al.; William K. Divers, J. Alston Adams, O. K. LaRoque, and Federal Savings and Loan Insurance Corporation. (3 copies.)

To: Irving G. Bishop, Sylvester Hoffman, Philip H. Angell and Verne Dusenbery, Attorneys-at-Law, 810 Chester Williams Bldg., 215 West Fifth Street, Los Angeles, California, Attorneys for Cross-defendant, Federal Home Loan Bank of San Francico, and all of its former and present officers and directors. (3 copies.)

To: O'Melveny & Myers, Attorneys-at-Law, Attention: Paul Fusell, 900 Title Insurance & Trust Bldg., 433 So. Spring Street, Los Angeles, California, Attorneys for defendant and cross-claimant, Federal Home Loan Bank of Los Angeles, and Five Association Plaintiffs. (1 copy.)

To: Richard FitzPatrick, Esq., Attorney-at-Law, 1400 Chapman Bldg., 756 So. Broadway, Los Angeles, California, Attorney for defendant and cross-claimant, Federal Home Loan Bank of Los Angeles, and Five Association Plaintiffs. (1 copy.) [14074]

To: W. I. Gilbert, Jr., Esq., Attorney-at-Law, 939 Rowan Building, Los Angeles 13, California, Attorney for First Federal Savings and Loan Association of Wilmington. (1 copy.)

To: Albert A. Rosenshine, James E. Burns, and Charles Dal Sooy, Esqs., Attorneys-at-Law, 111 Sutter Street, San Francisco 4, California, Attorneys for Pioneer Investors Savings and Loan Asso-

ciation, et al., and their respective officers and directors. (2 copies.)

To: Alden Ames, Esq., Attorney-at-Law, 435 Russ Building, 235 Montgomery Street, San Francisco 4, California, Attorneys for Pioneer Investors Savings and Loan Association, et al., and their respective officers and directors. (1 copy.)

To: Linnell & Smith, Esqs., Attorneys-at-Law, 402 Jergins Trust Building, Long Beach 2, California, Attorneys for defendants and cross-defendants Harold Lee Newendorp, et al. (1 copy.)

To: Robert A. Moffitt, Esq., Attorney-at-Law, 11196 Long Beach Blvd., Lynwood, California, Attorney for Defendant and cross-defendant Land Title Insurance Company. (1 copy.)

To: Thomas F. Menzies and Harold L. Watt, Esq., Attorneys-at-Law, 1017 Rowan Building, 458 South Spring Street, Los Angeles 13, California, Attorneys for defendant, Home Indemnity Company. (1 copy.)

To: Raymond Tremaine, Esq., Attorney-at-Law, 210 West Seventh Street, Los Angeles 14, California, Attorney for Robert H. Wallis, defendant and cross-claimant in interpleader. (1 copy.)

To: Lyman B. Sutter, Esq., Attorney-at-Law, 512 Jergins Trust Building, Long Beach 2, California, Attorney for defendants and cross-claimant in interpleader Title Service Company. (1 copy.) [14075]

To: F. Henry NeCasek, Esq., Attorney-at-Law,

3233 E. Anaheim Street, Long Beach 4, California, Attorney for Defendant and cross-claimants Roy E. Hegg and George Turner. (1 copy.)

To: Charles K. Chapman, Attorney-at-Law, Ocean Center Building, Long Beach 2, California, Attorney for third-party plaintiff and cross-claimant Long Beach Federal Savings and Loan Association. (1 copy.)

by placing the number of copies indicated after the names of the respective attorneys, in envelopes addressed respectively to said parties, at their office addresses, and by then sealing said envelopes and depositing the same with postage thereon fully prepaid, in the United States Post Office at Long Beach, California, where is located the persons for and by whom said service was made.

That there is delivery service by United States Mail at the places so addressed, or there is a regular communication by mail between the place of mailing and the places so addressed.

/s/ MARGARET O. SHALLIS.

Subscribed and sworn to before me this 14th day of March, 1950.

[Seal] /s/ BERNICE M. POWERS,
Notary Public in and for
Said County and State.

My commission expires Aug. 16, 1952.

[Endorsed]: Filed March 14, 1950. [14076]

[Title of District Court and Cause.]

RESPONSE TO THE AFFIDAVITS OF J. HOWARD EDGERTON AND TRACY SKELTON

Come now the defendants, Home Loan Bank Board, William K. Divers, J. Alston Adams and O. K. LaRoque, Members of the Home Loan Bank Board, and the Federal Savings and Loan Insurance Corporation, an instrumentality of the United States wholly owned by the United States, and without waiving their objections to the jurisdiction and their objections to the venue and their other objections but specifically reserving and asserting the same, file the [14139] attached affidavits in response to the affidavits of J. Howard Edgerton and of Tracy Skelton, and in addition to the attached affidavits by this reference make the affidavit of J. Francis Moore and attachment thereto, marked for identification as "Govts Exhibit C Date Nov. 7, 1949 No. 11-7-49-C Identification" in the proceedings before this Court in the above-entitled action held on November 7, 1949, a part of their response

to the said affidavit of J. Howard Edgerton and Tracy Skelton the same as if attached hereto.

/s/ ERNEST A. TOLIN,
United States Attorney.

By /s/ PAUL FITTING,
Assistant U. S. Attorney,

Attorneys for Defendants, the Home Loan Bank Board, William K. Divers, Chairman; J. Alston Adams, Member and O. K. LaRoque, Member of the Home Loan Bank Board, and the Federal Savings and Loan Insurance [14140] Corporation.

[Title of District Court and Cause.]

AFFIDAVIT OF JOHN H. FAHEY IN RESPONSE TO THE AFFIDAVITS OF J. HOWARD EDGERTON AND TRACY SKELTON

Commonwealth of Massachusetts—ss.

John H. Fahey, being first duly sworn, on oath deposes and says:

1. At all times from June 14, 1933, to July 27, 1947, affiant was a member of the Federal Home Loan Bank Board and from November 2, 1933, to July 27, 1947, was its Chairman; from February 24, 1942, to July 27, 1947, [14141] he was Federal Home Loan Bank Commissioner; and at all times from July 27, 1947, to December 20, 1947, he was Chairman of the Home Loan Bank Board.

2. That from the time of his appointment as a member of the Federal Home Loan Bank Board and his assumption of duties as such there was under consideration and study by the Federal Home Loan Bank Board the question of a reduction in the number of Federal home loan banks; that at the time of the original establishment of the twelve regional Federal home loan banks there had been no experience upon which to base the location of the Banks or determine the economical number of said Banks; that the intention was at all times that the Banks should be located for the convenience of the institutions using them and that no greater number of Banks should be maintained than would be economically sound and able to support themselves.

3. That from time to time studies were made for and by the Federal Home Loan Bank Board relative to the location of Federal home loan banks and the adjustment of the Federal home loan bank districts; that the documents hereto attached, to wit, Exhibits No. 1, No. 2, No. 3, No. 4, No. 5, and No. 6 are true and correct copies of studies and memoranda made between October, 1936, and December, 1945, relative to the relocation and consolidation of the Federal home loan banks and adjustment of the Federal home loan bank districts; that the Mr. Catlett and the Mr. Stevenson referred to in Exhibit No. 1 were, in 1936, members of the Federal Home Loan Bank Board, and the Horace Russell referred to in said memoradum was the then General Counsel for the Federal Home Loan Bank Board; that Exhibit

No. 2 is a true and correct copy of a study made for the Federal Home Loan Bank Board in the year 1939 relative to consolidation of the Federal home loan banks and adjustment of the Federal home loan bank districts; that Exhibit No. 3 is a true and correct copy of a study of the legal aspects of consolidating the Federal home loan banks and adjusting the Federal home loan bank districts, made at affiant's request by the then General Counsel for the Federal Home Loan Bank Board; that Exhibit No. 4 is a true and correct copy of a study made by Harland G. Keller, then Assistant Governor of the Federal Home Loan Bank System, in August or September, 1945, relative to the consolidation of the [14142] Federal home loan banks and the adjustment of the Federal home loan bank districts, and that said study was made at the request of this affiant, then Federal Home Loan Bank Commissioner; that Exhibit No. 5 is a true and correct copy of a memorandum written by affiant on December 11, 1945, relative to the uneconomical operation of the Federal Home Loan Bank of Portland; that Exhibit No. 6 is a true and correct copy of a memorandum prepared by said Harland G. Keller on or about January 23, 1946, relative to the economies of merging the Federal Home Loan Bank of Los Angeles with the Federal Home Loan Bank of Portland and moving the Federal Home Loan Bank of Portland to San Francisco.

4. That the Federal Home Loan Bank of Portland in September or October, 1945, had only one

loan outstanding and that one in the amount of $5,000.00; that about that time one Ben A. Perham, a Director of the Federal Home Loan Bank of Portland, came to Washington and discussed with affiant the operations of the Federal Home Loan Bank of Portland; that said Ben A. Perham advised this affiant that the facilities of the Federal Home Loan Bank of Portland had been used little by the associations in that area; that the Bank had made its money by borrowing Government money at a low rate and investing it in Government bonds at a higher rate, and that due to the fact that there was so much money deposited in the associations they had little or no need to borrow from the Bank; that said Ben A. Perham stated he could see no prospect of any change in the situation.

That in December, 1945, one Frank H. Johnson, President of the Federal Home Loan Bank of Portland, came to Washington, D. C., and discussed with affiant the operations of the Federal Home Loan Bank of Portland; that said Frank H. Johnson told affiant that there was, so far as he could see, no prospect of that Bank's doing sufficient business economically to support itself.

It was immediately following the interview with said Frank H. Johnson that this affiant requested Harland G. Keller to make a study and submit a report of the economies, if any, that would be effected by a consolidation of the Los Angeles and Portland Banks. [14143]

Shortly after the receipt of the report from the said Harland G. Keller (here identified as Exhibit

No. 6) affiant discussed with the President of the United States the advisability of consolidating certain Federal home loan banks and particularly the consolidation of the Federal Home Loan Bank of Los Angeles with the Federal Home Loan Bank of Portland; that the President told affiant to proceed to make such consolidations; that affiant explained that he was ready to assume the responsibility but knew that changes along these lines would be objected to in some cases because of local influences, and asked the President if he did not feel it would be desirable to discuss such changes with someone who had more time than the President to consider them. The President stated that this was an excellent idea and asked affiant to discuss them with Mr. John W. Snyder, then Director of the Office of War Mobilization and Reconversion; that affiant had several conferences with Mr. Snyder and discussed with him figures and districts concerning possible consolidations; that thereafter and on March 13, 1946, affiant sent to Mr. Snyder a letter, with attachments, relative to the proposed consolidation of the Federal Home Loan Bank of Los Angeles with the Federal Home Loan Bank of Portland; and that a true and correct copy of said letter and attachments (Exhibit No. 7) is attached hereto; that said letter correctly and truly represented the opinion of affiant as to the advisability of consolidating the Los Angeles and Portland Banks; that thereafter and on March 19, 1946, in response to information that Mr. Snyder had called affiant and wished

affiant to call back, affiant telephoned Mr. Snyder who advised that affiant should "go straight ahead" with the plan for consolidation of the Los Angeles and Portland Banks. Affiant asked Mr. Snyder if he had had an opportunity to check the matter with the President and he said he had, and that the President was completely in agreement.

This affiant never threatened or proposed to take any disciplinary action of any kind against any savings and loan association or any member of a Federal home loan bank on account of its use of funds to contest the action of the Federal Home Loan Bank Administration in consolidating [14144] the Federal Home Loan Bank of Los Angeles or in appointing a conservator for the Long Beach Federal Savings and Loan Association or its use of funds for any litigation, including the litigation described in the caption of this affidavit.

/s/ JOHN H. FAHEY.

Subscribed and sworn to before me this 18th day of March, 1950.

[Seal]: /s/ MARY T. DUFFY,
Notary Public.

My commission expires August 11, 1950. [14145]

[Title of District Court and Cause.]

AFFIDAVIT OF JOHN M. WYMAN

District of Columbia—ss.

John M. Wyman, being first duly sworn, on oath deposes and says:

That he is Chief Supervisor, employed by the Home Loan Bank Board and that under regulations and direction of said Board he is responsible for the supervision of all Federal savings and loan associations and for the analysis of all reports of supervisory examinations. [14184]

That the examination of the First Federal Savings and Loan Association of Wilmington, California, as of December 9, 1949, was a regular, customary, routine examination as is made of all Federal savings and loan associations periodically.

That the examination was not made for the purpose of ascertaining what legal expenses were being incurred or disbursed by the association in connection with the consolidation of the Federal Home Loan Bank of Los Angeles, the appointment of a conservator for the Long Beach Federal Savings and Loan Association, or any litigation in connection therewith.

That the examiners were not instructed to make any special report on such expenditures.

That, in fact, no such report was submitted by the examiners.

That no examinations of any associations have

been ordered or made for the purpose of ascertaining whether or not any association has incurred or disbursed legal expenses in connection with the consolidation of the Federal Home Loan Bank of Los Angeles, the appointment of a conservator for the Long Beach Federal Savings and Loan Association, or any litigation in connection therewith.

/s/ JOHN M. WYMAN.

Subscribed and sworn to before me this 17th day of March, 1950.

[Seal] /s/ PAUL P. PFEIFFER, JR.,
Notary Public.

My commission expires Oct. 15, 1952. [14185]

(Title of District Court and Cause.]

AFFIDAVIT OF WILLIAM K. DIVERS

District of Columbia—ss.

William K. Divers, being first duly sworn, upon oath deposes and says:

That he is the Chairman of the Home Loan Bank Board and as such is its chief executive officer.

That the Home Loan Bank Board has never taken or proposed to take any disciplinary action of any kind against any savings and loan association or [14186] any member of a Federal Home Loan Bank on account of its use of funds to contest the action of the Federal Home Loan Bank Administration in consolidating the Federal Home Loan Bank

of Los Angeles or in appointing a conservator for the Long Beach Federal Savings and Loan Association or its use of funds for litigation in connection therewith, including the litigation described in the caption of this affidavit.

/s/ WILLIAM K. DIVERS.

Subscribed and sworn to before me this 18th day of March, 1950.

[Seal] /s/ PAUL PFEIFFER, JR.,
Notary Public.

My commission expires Oct. 15, 1952. [14187]

[Title of District Court and Cause.]

AFFIDAVIT OF JOHN H. FAHEY

Commonwealth of Massachusetts—ss.

John H. Fahey, being first duly sworn, deposes and says:

1. At all times from November 2, 1933, to July 27, 1947, affiant was Chairman of the Federal Home Loan Bank Board, and as such, at all times from February 24, 1942, to July 27, 1947, was Federal Home Loan Bank Commissioner. At all times from July 27, 1947, to December 20, 1947, affiant was Chairman of the Home Loan Bank Board. [14188]

2. As Federal Home Loan Bank Commissioner, affiant was vested with the duty of administering the Federal Home Loan Bank Administration. Among other things, said Administration had the

function of providing for the incorporation, examination, and regulation of Federal savings and loan associations. The principal function of these institutions is to receive savings of members of the public and to invest them chiefly in loans upon homes or combination home and business properties. Federal savings and loan associations are local institutions. They are mutual and cooperative in nature. They do not accept deposits but receive funds in the form of investments in shares upon which the members receive dividends.

3. The inception of these Federal institutions was the outgrowth and result of a long history. Savings and loan associations—this term is here used as including also the essentially similar institutions known as building and loan associations, cooperative banks, and homestead associations—have existed in this country under state law since the early part of the nineteenth century and have performed a most valuable service in the promotion of thrift and home ownership. From small and humble beginnings as neighborhood organizations they grew to such an extent that during the nineteen twenties they reached an estimated number of more than twelve thousand, with assets estimated at more than eight billion dollars.

4. That there is a strong public interest in the proper administration of these institutions which hold themselves out to receive and protect the savings of the public, and particularly persons of moderate means, was recognized in state after state,

beginning in the latter part of the nineteenth century, by laws providing for their regulation and supervision by public officials. This legislative recognition of the quasi-public nature of these institutions paralleled to a large extent a similar movement, of earlier origin, for the public regulation and supervision of banking institutions.

5. After the establishment of the Federal Reserve System in 1913 of a reserve credit system for commercial banks, there arose the perception of a similar need for a central reserve system for savings and loan associations [14189] to enable them to meet seasonal or local needs or to meet general needs for funds in times of stress. Action toward this end was not consummated, however, until the mortgage panic which accompanied the general financial and business crises following the stock-market crash of 1929 brought into sharp focus the need for bringing these institutions within the protection of a credit reserve system. As a result of that experience there was enacted in 1932 the Federal Home Loan Bank Act, providing for the establishment of Federal Home Loan Banks in districts to be defined in accordance with the Act. Such banks were to be under the supervision of the Federal Home Loan Bank Board and were designed to provide a credit reserve system for their member institutions, which were to include savings and loan associations, savings banks, and insurance companies engaged in the making of long-term home mortgage loans. Pursuant to the provisions of the Act, the United States

Government purchased more than 93% of the original capital stock of the Federal Home Loan Banks, and at the end of 1945 it held, through the Reconstruction Finance Corporation, almost 63% of the total capital stock of said banks. At the close of 1945 the Federal Home Loan Bank System had 3,697 member institutions which had total assets of more than eight and a half billion dollars, according to figures derived from annual reports of such member institutions.

6. Provision was made by the Home Owners' Loan Act of 1933 for the establishment of Federal savings and loan associations. These were to be local institutions similar to state-chartered savings and loan associations, but were to operate on a unified plan under Federal charter. The relationship of these Federal associations to state-chartered savings and loan associations is similar to the relationship of national banks to state banks, Membership in a Federal Home Loan Bank was made compulsory for Federal savings and loan associations but remained optional for other eligible institutions.

7. The Home Owners' Loan Act of 1933, in authorizing the establishment of Federal savings and loan associations, provided that the Federal Home Loan Bank Board should have authority, under such rules and regulations as it might prescribe, to provide for the organization, incorporation, examination, [14190] operation, and regulation of these associations, and to issue char-

ters therefor, "giving primary consideration to the best practices of local mutual thrift and home-financing institutions in the United States." It further provided that the Board should have full power to provide in said rules and regulations for the reorganization, consolidation, merger, or liquidation of such associations, including the power to appoint a conservator or receiver to take charge of the affairs of any such association, to require an equitable readjustment of its capital structure, or to release it from such control and permit its further operation.

8. In the next following year, 1934, Title IV of the National Housing Act provided for the creation of the Federal Savings and loan Insurance Corporation. Its purpose is to insure, up to $5,000 for each investor in each insured institution, the safety of withdrawable or repurchasable investments by the public in all Federal savings and loan associations and in such other savings and loan association as apply for insurance and are found eligible. The capital stock of the Insurance Corporation is wholly owned by the United States, and it was provided that the members of the Federal Home Loan Bank Board, now the Home Loan Bank Board, should constitute the board of trustees of the Insurance Corporation.

9. By virtue of Executive Order No. 9070 of February 24, 1942, issued under Title I of the First War Powers Act, 1941, the functions, powers, and duties of the Federal Home Loan Bank Board and

its members and of the Board of Trustees of the Federal Savings and Loan Insurance Corporation were placed in the Federal Home Loan Bank Administration, which was administered by affiant as Federal Home Loan Bank Commissioner.

10. The Federal Home Loan Bank Administration, which affiant administered, was thus charged with the protection of the interest of investors, including earnings on shares, and of the public, in a major segment of the financial structure of the country. Proper discharge of such a responsibility demands and requires constant vigilance for the detection and suppression of tendencies which, unchecked, might lead to disasters which not only might affect that segment of the economy [14191] dealing with thrift and home-financing institutions but might spread to other segments of the economy as well. This has been especially true since the conclusion of the war, when the country has been in the grip of inflationary pressures which, if unchecked, might lead to a repetition of the mortgage crisis which paralyzed the country in the early nineteen thirties. Such inflationary and sepeculative tendencies have been particularly apparent in the State of California and in Los Angeles County. While the great majority of savings and loan association operators are believed to be conducting sound and safe operations, it has been necessary to be constantly on guard to curb the dangerous practices of a few whose activities threaten the whole structure.

11. The appointment of a conservator for the Long Beach Federal Savings and Loan Association was made in the exercise of the express power and responsibility conferred by the Home Owners' Loan Act of 1933 and was motivated solely by the purpose of protection of the interests of the investors in said association and the interests of the public. Affiant himself did not sign or issue the order by which the conservator was appointed, but this was done by Harold Lee, Deputy Federal Home Loan Bank Commissioner, who had full authority to do so. The proposal to appoint a conservator was made by the said Harold Lee on the basis of facts disclosed to him, and the grounds upon which the appointment was made are stated in the order of appointment and are discussed in the affidavit of John M. Wyman, Chief Supervisor for the Federal Home Loan Bank Board, filed herewith. Prior to the issuance of said order affiant, then in New York, was called by the said Harold Lee and informed by him of the proposed action and authorized and approved it. Affiant had been kept constantly informed of the dangerous conditions existing in the Long Beach Federal Savings and Loan Association and with the information revealed by reports of examination, and was fully aware of the facts then existing as set out in said affidavit of John M. Wyman. It was solely on the basis of these facts that affiant authorized and approved the appointment of the conservator for the protection of the members of the association and of the public and the [14192] Government. It was

and is the opinion and belief of affiant that such action was necessary in the public interest and in the proper discharge of the supervisory responsibilities resting upon the Federal Home Loan Bank Administration.

12. At various places in the pleadings and petitions in this case, reference is made to what is designated as "the seizure of the solvent Federal Home Loan Bank of Los Angeles." There was no seizure of the Federal Home Loan Bank of Los Angeles. Under Orders Nos. 5082, 5083 and 5084 of the Federal Home Loan Bank Administration, the Federal Home Loan Bank of Los Angeles was combined with the Federal Home Loan Bank of Portland and the latter bank was moved to San Francisco and its name changed to Federal Home Loan Bank of San Francisco. Offices were left in both Los Angeles and Portland, so that the entire Pacific coast area now has, in addition to facilities at these two cities, similar facilities at San Francisco. Federal Home Loan Banks are regional reserve banks, and the action which was taken provides a much stronger reserve banking organization in that area.

13. The combination of these banks was brought about by affiant as Federal Home Loan Bank Commissioner under the express authority of Sections 3, 25, and 26 of the Federal Home Loan Bank Act, which Act vested in the Federal Home Loan Bank Board (whose functions were in 1946 in the Federal Home Loan Bank Administration and are now in the Home Loan Bank Board) wide supervisory

authority over the Federal Home Loan Bank System. Among other powers, Section 3 authorized the Board to set up Federal Home Loan Bank districts and to readjust the districts thus created. Section 25 provides that each Federal Home Loan Bank shall have succession until dissolved by the Board or by further act of Congress. Section 26 provides that, whenever the Board finds that the efficient and economical accomplishment of the purposes of the act will be aided by such action, and in accordance with such rules, regulations, and orders as the Board may prescribe, any Federal Home Loan Bank may be liquidated or reorganized, and its stock paid off and retired in whole or in part in connection therewith after paying [14193] or making provision for the payment of its liabilities. It further provides that, in the case of any such liquidation or reorganization, any other Federal Home Loan Bank may, with the approval of the Board, acquire assets of such liquidated or reorganized bank and assume liabilities thereof, in whole or in part.

14. There was no connection between the appointment of a conservator for Long Beach Federal Savings and Loan Association and the readjustment of the Eleventh and Twelfth Districts and the consolidation thereof. Affiant in making said readjustment and consolidation of said districts was exercising the responsibility with which he was charged by the Federal Home Loan Bank Act and by Executive Order No. 9070, which vested in him the duties of the Federal Home Loan Bank Board.

His sole motive and purpose in the bank matter was to aid in the efficient and economical accomplishment of the purposes of the Federal Home Loan Bank Act and in so doing to strengthen the reserve facilities on the Pacific coast to aid in meeting the serious post-war inflationary movement threatening the stability of savings and loan institutions in that area. Even with the Federal Home Loan Bank of Los Angeles and the Federal Home Loan Bank of Portland combined into one Federal Home Loan Bank of San Francisco, the total assets of this combined reserve bank for the eleven western states and territories were, immediately after the merger, only $58,440,053 as opposed to total assets of all its member institutions $1,045,000,000. Affiant's action in the bank matter was taken only after long and careful consideration and analysis of all factors which seemed to affect the situation. Such action had nothing to do with the appointment of a conservator for the Long Beach Federal Savings and Loan Association, and the appointment of such a conservator was in no way contemplated at the time of said readjustment.

15. Affiant further states that his disapproval of C. E. Berry as president of the Federal Home Loan Bank of Los Angeles was in pursuance of express authority conferred by Section 12 of the Federal Home Loan Bank Act, which provides that the selection of officers by a Federal Home Loan Bank shall be subject to the approval of the Federal Home Loan Bank Board (whose functions were

placed in the Federal Home Loan Bank Administration by [14194] Executive Order No. 9070); that when the name of the said Berry was submitted to him he found himself unable conscientiously to approve him as suitable and qualified for said office; that affiant was at all times ready and willing to approve the selection of any person whom he deemed suitable and qualified therefor; and that affiant at no time urged, supported, or even suggested the selection or candidacy of any person as such president, or attempted to dictate or require any method for the selection of a president of said bank.

16. Affiant further states that there has been no confiscation of the Federal Home Loan Bank of Los Angeles or any of its assets by him or by the Federal Home Loan Bank Administration or at all. On the contrary, affiant states that after years of careful study and appraisal of all factors the Federal Home Loan Bank of Los Angeles and the Twelfth Federal Home Loan Bank District were merged into the Federal Home Loan Bank of Portland and the Eleventh Federal Home Loan Bank District to form one stronger Federal Home Loan Bank upon the recommendation of the government officials whose duty it was to make recommendations, and upon affiant's finding that such action would aid the efficient and economical accomplishment of the purposes of the Federal Home Loan Bank Act. Affiant further states that neither the Long Beach Federal Savings and Loan Association nor any of its assets were seized by him or by the

Federal Home Loan Bank Administration or by any officer or employee of the United States or any of its agencies, and that affiant has never intended, desired, conspired, undertaken, or planned to harm or destroy that association or its assets or to merge that association with any other institution.

/s/ JOHN H. FAHEY.

Subscribed and sworn to before me this 19th day of April, 1949.

[Seal] /s/ MARY T. DUFFY,
Notary Public. [14195]

AFFIDAVIT OF R. J. STRECKER

City of Washington,
District of Columbia—ss.

R. J. Strecker, being first duly sworn, on oath deposes and says:

1. That he is District Examiner for the Third Federal Home Loan Bank District; that in 1946 he was Assistant District Examiner for the Federal Home [14196] Loan Bank Administration, in charge of the examination of the Long Beach Federal Savings and Loan Association and that the facts herein stated are based upon his personal knowledge and upon examination of the records of the Long Beach Federal Savings and Loan Association.

Qualifications of Affiant

2. That for the past twelve years he has been in the Examining Division of the Home Loan Bank Board, Federal Home Loan Bank Board, and Federal Home Loan Bank Administration, and for more than four years prior thereto he was with the Banking Department of the Commonwealth of Pennsylvania and that he is a graduate of the University of Pennsylvania with the degree of Bachelor of Science in Economics; that his education and experience have peculiarly fitted him for examination of financial institutions and that the facts stated herein are based on his examination of the Long Beach Federal Savings and Loan Association as of May 18, 1946, and of the records of said Association.

Officers and Directors

3. That a charter was issued to the Long Beach Federal Savings and Loan Association on July 10, 1934; that the first meeting of the members and the first meeting of the directors were both held on July 21, 1934; that at the first members' meeting seven directors were elected, including T. A. Gregory, M. T. Killingsworth, J. E. Gregory (father of T. A. Gregory), J. K. Reeder and S. I. Bacon, all of whom had continuously held office as directors since that date; that these five persons named were also the directors of the First Federal Savings and Loan Association of Bellflower; that two other directors, J. S. Watts and H. H. Law, elected on July 21, 1934, had since died; that H. H. Law was replaced in January, 1941, by W. M. McColl (son-in-law of

J. E. Gregory), and J. S. Watts was replaced in 1943 by A. A. Allen; that W. M. McColl resigned in January, 1942, and had not been replaced, and at the time of said examination the board consisted of six members; that at the first directors' meeting T. A. Gregory was elected President, J. E. Gregory, Secretary-Treasurer, and J. K. Reeder, Attorney; that Mrs. L. N. Schilling (sister of T. A. Gregory and daughter of J. E. Gregory), who was elected Assistant Secretary on July 21, 1934, severed her connection with the Association [14197] in 1936; that other officers on May 18, 1946, and the years in which they were elected, were S. I. Bacon (1943), Charles E. Berry (1946), Roy Wolfers (1937), all vice presidents, and Ethel L. Roberts, vice president (1945) and assistant secretary (1936); that S. I. Bacon was one of the original directors, and Ethel L. Roberts had been in the employ of the Association since 1934.

Annual Organization Meetings of Directors

4. That in January of each year the directors had held organization meetings; that at these meetings resolutions had been adopted delegating blanket authority to one or more officers to perform certain acts; that certain of the resolutions mentioned below had been adopted at all organization meetings, and since 1943 to the date of said examination all of the following powers had been delegated to the officers: to appraise real estate and approve loans, to fix interest rates, loan fees, service charges, appraisal fees and other loan charges, to make additional

advances to borrowers, to modify and extend loan contracts, to effect partial reconveyances of loan security, to sell real estate loans at a price not less than their unpaid balance, and to sell real estate owned; that some, but not all, of these resolutions required that acts taken by the officers be submitted to the directors for ratification; that three of the six directors were salaried officers, namely T. A. Gregory, J. E. Gregory and S. I. Bacon.

Joint Occupancy

5. That at various times since incorporation the Association's office had been used as a mailing address for nine other organizations, including Title Service Company and Pacific Insurance Agency, these latter two companies operating in rent free space furnished by the Association in its offices, and being served by Association employees whose salaries were paid by the Association; that Title Service Company was originally incorporated in 1935 and had a directorate in 1942 (the last date for which definite information was available) identical with that of the Association; that its principal functions were to act as trustee under deeds of trust and as an escrow holder; that practically all deeds of trust held by the Association [14198] named Title Service Company as trustee; that practically all escrow fees arising from Association loans were retained by Title Service Company; that there was no distinct division of space between that occupied by the Association and that occupied by Title Service Company nor was it possible to segregate the

time of the fifteen employees of the Association who served both Title Service Company and the Association; that the aggregate annual salary of these employees on May 18, 1946, was $33,840; that none of the income of Title Service Company had ever been paid to the Association; that Pacific Insurance Agency was owned and operated by T. A. Gregory; that as a hazard insurance broker it had written policies covering a substantial portion of the properties securing Association loans, receiving and retaining the usual commissions derived from such business; that there was no distinct division of space between that occupied by the Association and that occupied by the Pacific Insurance Agency and it was not possible to segregate the time of the two employees who served both the Pacific Insurance Agency and the Association; that the aggregate annual salary of these employees on May 18, 1946, was $4,150; and that none of the income of the Pacific Insurance Agency had ever been paid to the Association.

Loans Secured by First Deeds of Trust

6. A. Concentration.

That on May 18, 1946, outstanding loans secured by first deeds of trust totaled $12,417,841; that of this sum 52.8%, or $6,551,357, was due from twenty-one borrowers, including J. D. Willhoit, the Jones Brothers and Jackson Turner; that the relations of these borrowers with the Association and its management will be discussed in succeeding paragraphs.

B. J. D. Willhoit Loans.

1. Identity of J. D. Willhoit

That J. D. Willhoit had secured from the Association 645 loans aggregating $2,101,568, both as a representative of one E. N. Frame and as an individual; that these loans were secured by approximately 1,246 properties, practically all of which were sold under contracts of sale or second deeds of trust to individual purchasers, subject to first deeds of trust held by [14199] the Association; that monthly payments were collected by the Association from the individual purchasers; that J. D. Willhoit, a real estate broker and builder, occupied a small office in the rear of the Association's building; that this space was given to him rent free by the Association until May 15, 1946, at which time he leased this office and an adjoining one from the Association for a ten-year term at a monthly rental of $30.00; that J. D. Willhoit acted as a "dummy" at the request of T. A. Gregory in connection with the purchase of a loan by the Association secured by a property in the name of one Paul Cawood, who is a nephew of T. A. Gregory, according to J. D. Willhoit; that approximately $415,000, which arose from collections from individual purchasers of properties securing Willhoit loans, has been paid to him by Association checks during a five-year period ended in March, 1946; that of this sum checks totaling approximately $120,000 were cashed by him either at the Association's office or at a local bank, and it was not possible to determine whether the other

checks were also so cashed; that on several occasions two or more Association checks were paid to J. D. Willhoit in approximately equal amounts on the same day, such checks being charged to the same account on the Association's books; that collection fees of 25 cents per payment charged by the Association to J. D. Willhoit were discontinued in October, 1941, without explanation in the Association's records; that, according to an oral statement made to the examiners by J. D. Willhoit, these charges were waived by T. A. Gregory under an oral understanding that all escrow fees and fire insurance brokerage arising from properties owned by J. D. Willhoit would go to Title Service Company and Pacific Insurance Agency, respectively.

2. J. D. Willhoit and E. N. Frame

That between 1938 and 1940 J. D. Willhoit negotiated with the Association for 638 uninsured loans to be granted to E. N. Frame, a Los Angeles builder, in amounts totaling $1,510,975, to finance the construction of 892 dwellings; that the loan funds were not only sufficient to defray the entire construction and land acquisition and improvement costs, but also they were in large enough amounts to permit the payment to J. D. Willhoit [14200] of 9½% (approximate) fees totaling $146,184 and the payment to one M. G. Atwood of 2½% fees totaling $37,774; that, furthermore, title expenses, interest on the loans during construction, fire insurance premiums, and a 5% (approximate) initial service fee to the Association were paid from the loan

funds; that J. D. Willhoit orally informed the examiners that he was paid the sum of $146,184 for such services as arranging the financing, supervising the payment of construction costs, and assisting in the sale of completed properties, and that M. G. Atwood, a real estate broker representing Frame, was paid $37,774 for such services as introducing E. N. Frame and J. D. Willhoit and for assisting in the sale of the completed properties; that these loans to E. N. Frame were evidenced by individual first deeds of trust and notes executed by various "dummies"; that E. N. Frame assumed no personal liability for these loans nor was his indebtedness to the Association disclosed on the public records (the last two of the Frame loans, granted in 1940, were also evidenced by promissory notes signed by J. D. Willhoit); that, as the 892 properties securing these loans were completed, they were sold under contract to individual purchasers; that these contracts, which required monthly payments of principal and interest, were assigned to the Association as additional security for its loans; that provision was made for the Association to collect the monthly contract payments at a fee of 25 cents per payment (this fee, as heretofore noted, was waived by T. A. Gregory in October, 1941, after E. N. Frame's interests were transferred to J. D. Willhoit); that amounts so collected were to be accumulated, the required payments on the Association's first deeds of trust deducted therefrom, and the balance paid to E. N. Frame monthly; that on January 25, 1941, E. N. Frame still owned 797 of the 892 properties which

had been constructed with Association loan funds; that substantially all of these properties were sold under contract to individual purchasers whose monthly payments were being collected by the Association, and substantially all were still subject to individual first deeds of trust; that on that date, January 25, 1941, J. D. Willhoit, according to an oral statement made by him to the [14201] examiners, offered to purchase E. N. Frame's interest in 797 properties for $100,000; that E. N. Frame accepted this offer, settlement to be made at the expiration of sixty days from January 27, 1941; that by two grant deeds dated January 27, 1941, and recorded April 12, 1941, E. N. Frame conveyed his interest in the 797 properties to J. D. Willhoit; that, according to J. D. Willhoit, Title Service Company had advanced him $10,000 to be used in the management of E. N. Frame's properties; that on January 28, 1941, an entry was made on the Association's books recording a loan of $100,000 to J. D. Willhoit; that of this $100,000 only $10,000 was disbursed, a check dated January 28, 1941, in this amount being paid to Title Service Company; that documentary evidence could not be found to support either the $100,000 loan to J. D. Willhoit or the $10,000 payment to Title Service Company; that on March 21, 1941, J. D. Willhoit executed a deed of trust for $110,000 in favor of one Cecil Crabb, a "dummy" for J. D. Willhoit, which instrument, like the grant deeds from E. N. Frame to J. D. Willhoit, was recorded on April 12, 1941; that the deed of trust from J. D. Willhoit to Cecil Crabb, contrary to the

usual practice in the Association, named Somerset Finance Corporation as trustee rather than Title Service Company (T. A. Gregory was secretary of Somerset Finance Corporation and S. I. Bacon was vice president); that Cecil Crabb assigned the deed of trust to the Association on April 12, 1941, as security for a loan of $110,000 to J. D. Willhoit; that the assignment was not recorded thereby concealing on the public records J. D. Willhoit's relation as a borrower from the Association; that on March 21, 1941, Frame's equity in these 797 properties approximated $498,000, representing the excesses of the amounts due from contract purchasers over the aggregate balances due on the first liens against the properties; that the loan to J. D. Willhoit of $110,000 was used to repay the $10,000 previously advanced to Title Service Company on January 28, 1941, and to purchase for $100,000 E. N. Frame's approximate equity of $498,000; that the loan files also contained the following completely executed and notarized instruments, which had not been recorded: [14202]

(a) Two grant deeds conveying the 797 properties from J. D. Willhoit to Title Service Company;

(b) Two grant deeds conveying the 797 properties from Title Service Company to J. D. Willhoit, as trustee for Title Service Company;

(c) Declaration of trust from Title Service Company, as trustor, to J. D. Willhoit, as trus-

> tee, covering the 797 properties, which declaration provides, in part: That Title Service Company may at any time remove J. D. Willhoit as trustee and appoint a successor to him; that J. D. Willhoit is to manage the trust estate, and that the net income from the trust estate is to be handled according to instructions given by Title Service Company;

that following the acquisition of E. N. Frame's interests by J. D. Willhoit, the Association continued to collect monthly payments from the contract purchasers, and to deduct from the sum of those payments, the amounts due the Association on the E. N. Frame loans; that these collections were intermingled with amounts collected from contracts and first deeds of trust underlying other loans to J. D. Willhoit (which will be hereinafter discussed), thus making it impossible to determine the exact relationship between the profit accruing to J. D. Willhoit from this transaction and the cash payments which had been made to him; that a calculation of the minimum profit would indicate that there had accrued to J. D. Willhoit by March 22, 1946, the date when the $110,000 loan was repaid, the sum of $313,000 and that minimum profits of $146,000 had yet to be realized; that when the Association granted the $110,000 loan to J. D. Willhoit to enable him to acquire E. N. Frame's holdings, it granted a loan in an amount equal to 100% of the consideration paid by J. D. Willhoit; that J. D. Willhoit agreed to pay the Association $40,-

000 out of the amounts to be collected from contract purchasers, after a sufficient sum had been collected to retire all his obligations against the properties; that on April 17, 1946, this $40,000 claim of the Association against J. D. Willhoit was compromised for $15,000, J. D. Willhoit assigning notes and deeds of trust in that amount to the Association in settlement; that the two loans originally granted to E. N. Frame in 1940, which were additionally secured by promissory notes signed [14203] by J. D. Willhoit, were in force at the date of this examination, and their balances aggregated $53,143, all of the original real estate security for these loans having been released except 42 properties.

3. J. D. Willhoit, as an individual

That in addition to the $110,000 loan to J. D. Willhoit to finance his purchase of E. N. Frame's interests, the Association had granted six other loans to him as an individual; that these loans, which were granted between 1939 and 1941, totaled $480,593 and were secured by 354 properties; that of these loans three were in force at the date of this examination; that in none of these cases do the public records disclose that J. D. Willhoit is an Association borrower, and that the collections from individual purchasers had been intermingled with those derived from the E. N. Frame properties; that on December 31, 1940, the Association sold by assignment 66 first deeds of trust and three parcels of real estate to J. D. Willhoit at their approximate cost to the Association of $125,340; that J. D.

Willhoit paid for this security by giving the Association his promissory note in the amount of $125,340, this being the entire sale price, and as security for the said note he reassigned the identical deeds of trust and real estate to the Association; that the interest rate averaged 6.5% per annum on the deeds of trust, as compared with 6.0% on J. D. Willhoit's promissory note; that forty-two of the trust deeds were less than six months delinquent, fourteen were between three and six months delinquent, nine were between six and twelve months delinquent, and only one was more than twelve months delinquent at the date of sale; that only six of the trust deeds appear to have presented collection problems; that J. D. Willhoit purchased the entire group of 66 trust deeds at their total unpaid balance, which was only 55.7% of the valuations assigned by the Association's appraisers to the real estate securing them; that payments made by the individual trustors were handled by the Association for J. D. Willhoit's benefit; that the three parcels of real estate which were purchased by J. D. Willhoit for $6,550 were later sold by him to individual purchasers; that from these sales J. D. Willhoit's potential profit was $1,550, or approximately 24%; that at the date of this examination this loan had been reduced to $395, all but one [14204] of the original deeds of trust having been released; that on April 1, 1941, an uninsured loan of $278,000 was granted to J. D. Willhoit to finance the construction of 139 houses; that the loan was not only sufficient in amount to

defray all construction costs including the acquisition cost of the land, but also permitted the payment of title charges, interest on the loan during construction, and a 5% initial service charge to the Association; that as the properties were completed they were sold to individual purchasers under contract of sale, the monthly payments on these contracts being paid to the Association; that at the date of examination this loan had a balance of $126,725 and was secured by 84 properties, the other 55 having been released; that in 1941, C. S. Jones, another of the Association's multiple borrowers, owned 140 properties subject to first deeds of trust held by the Association; that the loans evidenced by these deeds of trust had been granted to C. S. Jones in 1940 to finance construction of the properties; that on January 29, 1941, (four days after purchasing E. N. Frame's equity in 797 properties), J. D. Willhoit purchased C. S. Jones' interests in the 140 properties, and the Association disbursed $15,750 to C. S. Jones; that no documentary support for this disbursement could be found, except for a letter of even date from C. S. Jones to the Association stating that C. S. Jones was selling his interest in the aforesaid 140 properties to the "Long Beach Federal Savings and Loan Association, or its nominee"; that on June 3, 1941, these 140 properties, and one other property which had not previously been encumbered in favor of the Association, were pledged to the Association by J. D. Willhoit as security for a loan of $61,020;

that of this sum $15,750 was used to repay the advance made on January 29, 1941, to C. S. Jones; that the loan of $61,020 represented the full consideration paid by J. D. Willhoit to C. S. Jones for the latter's interests, which on June 3, 1941, amounted to approximately $66,385, representing the difference between the amounts due from individual purchasers of the properties and the amounts due the Association on the first liens held by it; that at the date of examination this loan had a balance of $4,858 and was secured by 53 properties, the other 88 having been released. [14205]

C. C. S. Jones, C. J. Jones and Jones Bros. Lumber Co.

1. Identity of borrowers

That C. S. Jones and C. J. Jones are brothers and are associated in the Jones Brothers Lumber Company; that loans granted to either or both of the Jones brothers between 1937 and 1942 aggregated $2,222,654 and were secured by 850 properties; that with the exception of an advance of $15,750 made to C. S. Jones in connection with the sale of his interests in 141 properties to J. D. Willhoit, mentioned above, and a blanket loan of $125,000, which is discussed hereinafter, all of the loans were granted to finance construction; that at the date of this examination there were 77 loans in force to C. S. and C. J. Jones with balances aggregating $558,320.

2. C. S. Jones Loans

That on July 16, 1940, the Association granted a loan of $436,000 to C. S. Jones to finance the construction of 218 dwellings; that this loan was evidenced by C. S. Jones' promissory note and was secured by individual notes and deeds of trust running from four individuals, two of whom were employees of C. S. Jones, to C. S. Jones and assigned by him to the Association; that whether or not the $436,000 loan was also sufficient to purchase the land could not be determined; that however, at least $44,032 was used for purposes other than construction, including $15,000 which was applied to the repayment of two advances made in November, 1940; that this $15,000, which had been disbursed by the Association in the form of two checks payable to Title Service Company, was recorded on the Association's books as loans to C. S. Jones; that documentary support for such loans to C. S. Jones could not be located; that on December 30, 1940, the $436,000 loan to C. S. Jones was substantially delinquent as to interest and no payments had been made on principal; that, furthermore, many other loans then outstanding in the names of C. S. Jones and C. J. Jones were in similar condition; that on that date a loan of $220,000 was set up on the books in the name of one R. G. Trigg (described by T. A. Gregory as an "associate" of C. S. Jones); that this loan was evidenced by R. G. Trigg's promissory note, and was secured by 100 of the 218 individual notes and deeds of trust men-

tioned in this paragraph; that these notes and deeds of trust, as [14206] previously explained, had been assigned to the Association by C. S. Jones; that some but not all of these assignments were cancelled; that C. S. Jones assigned 100 of 218 notes and deeds of trust to R. G. Trigg and the latter then assigned them to the Association; that the effect of this $220,000 loan to R. G. Trigg was to increase the original principal indebtedness on the 218 properties from $436,000 to $456,000, since $200,000 of the proceeds were applied to C. S. Jones' $436,000 loan, thereby reducing it to $236,000 and the new loan to R. G. Trigg was $220,000 or a total of $456,000 (the increase of $220,000 is secured by additional advance notes); that the remaining $20,000 of R. G. Trigg's loan was used to repay various delinquencies on loans in the names of C. S. Jones and C. J. Jones; that as the 218 properties securing these two loans were completed, they were sold under contract, and the payments on these contracts were collected by the Association for C. S. Jones' benefit, thereby indicating that R. G. Trigg was a nominee for C. S. Jones; that aside from a principal payment of $2,273 made on July 8, 1941, no reduction in the principal amounts of either the C. S. Jones or R. G. Trigg loans was made until September, 1942, the loans being seriously delinquent at that date; that subsequent to September, 1942, payments had been regular; that at the date of this examination these two loans had aggregate balances of $267,435 and were secured by 173 properties, the other 45 having been previously released;

that on May 10, 1941, the Association had in its possession a check payable to its order in the amount of $1,000, which check, drawn by C. J. Jones, had been returned by the bank marked "not sufficient funds"; that this claim against C. J. Jones for $1,000 was repaid with $441 obtained from undisbursed funds on the R. G. Trigg loan, the balance of $559 being added to a secured advance account of another borrower, which secured advance account was immediately charged-off as "Loss on Sale of Investments"; that on December 16, 1942, a loan of $125,000 was granted to C. S. Jones, the proceeds being used to repay obligations of C. J. Jones; that this loan will be discussed in the next paragraph of this affidavit. [14207]

3. C. J. Jones Loans

That in early 1941, C. J. Jones applied to the Association for 795 FHA loans; that in connection with this application T. A. Gregory wrote on April 17, 1941, to the Federal Housing Administration relative to C. J. Jones' application, stating that C. J. Jones had placed with the Long Beach Federal Savings and Loan Association "a $100,000 guarantee to carry to completion the proposed project." (It is significant that on May 10, 1941, the Association held a check of $1,000 from C. J. Jones which had been returned for insufficient funds.) That T. A. Gregory in his letter also transmitted a financial statement of C. J. Jones dated April 16, 1941, showing "Cash in Long Beach Federal Savings and Loan Association — $100,000."; that on June 19,

1941, the Federal Housing Administration wrote to Mr. T. A. Gregory requiring that C. J. Jones establish a cash bond of $100,000 with the Association, to which letter Mr. T. A. Gregory replied two days later stating that C. J. Jones had pledged the said sum; that clipped to the side of one of the Association's loan files was a check for $100,000 dated June 23, 1941, drawn by C. J. Jones on the Bank of America in favor of the Association; that this check had not been endorsed; that of the original 795 applications, only 120 were accepted by the Association, approximately 550 were assigned to the Bank of America and the disposition of the remainder is not known to affiant; that on July 7, 1941, T. A. Gregory wrote to C. J. Jones that the Association would release a pro rata portion of the $100,000 guarantee; that the Association's files contained an unsigned letter to the Bank of America, dated July 14, 1941, stating that the sum of $85,000 was being transferred to that Bank as a guarantee by C. J. Jones in connection with the approximately 550 houses which it was financing; that on July 14, 1941, the Association disbursed $45,000 by check to C. J. Jones and on July 15, 1941, it disbursed another $40,000 to C. J. Jones; that neither of these cancelled checks could be found; that both disbursements are stated to be for "Labor and Materials"; that both were drawn against C. J. Jones' loan funds; that on September 29, 1941, C. S. Jones assigned to the Association the sum of $100,000 from the proceeds of the loans on the 550 houses

which the Bank of America was financing; that C. J. Jones' financial [14208] statement of July 21, 1942, submitted to the Federal Housing Administration in order to obtain an increase in the loan insurance commitments, stated that he then had cash sums of $85,000 and $15,000 in the Bank of America and the Long Beach Federal Savings and Loan Association, respectively, and that these sums were being held as completion bonds; that while negotiations were in process for the granting of the 120 FHA loans heretofore discussed, the Association advanced to C. J. Jones amounts totaling $24,-446; that documentary support for these amounts could not be found; that repayment was made on October 8, 1941, by J. D. Willhoit, another multiple borrower, whose loans have been previously discussed; that according to an oral statement made by J. D. Willhoit to the examiners, this repayment was made by him because he was indebted to the Jones Brothers Lumber Company for lumber which he had purchased; that on July 11, 1941, the 120 FHA loans, heretofore mentioned, were granted by the Association in the aggregate amount of $393,-850; that this sum proving insufficient, the Association advanced additional sums aggregating $57,427 to C. J. Jones, purportedly to meet expenses due to delays in construction and increased costs, as well as to pay the 1942 taxes; that by December 16, 1942, serious difficulties were being encountered in connection with the aforesaid 120 house development; that liens aggregating $62,000 had been filed against the properties, interest and principal pay-

ments were delinquent to the extent of $23,456 and other deficiencies, substantially all arising from over-disbursements of loan funds, totaled $39,544; that in order that these obligations could be discharged the Association granted a loan of $125,000 to C. S. Jones, the proceeds of which were used to repay the items enumerated; that this loan of $125,000 was a second blanket deed of trust secured by the properties previously pledged to the Association by C. S. Jones and R. G. Trigg, as noted in the preceding section of this affidavit, and also by 178 properties in a development financed by the Association in April, 1940; that as further security the blanket deed of trust also covered, as a first lien, two properties located on Country Club Drive, possibly the homes of the Jones brothers, since their residences are located there; that at the date of this examination the loans to C. J. Jones had an aggregate balance of $236,762 and are [14209] secured by 74 houses; that the $125,000 loan to C. S. Jones has a balance of $54,123 and is secured by 293 properties against which it is a second lien, the two Country Club Drive properties having been released.

D. Jackson Turner Loans

1. Identity of Jackson Turner

That Jackson Turner, a speculative builder whose operations had been financed by the Association, had erected houses both for resale and as a contractor for various individuals, who had borrowed con-

struction loan funds from the Association; that some of the properties which he had erected were constructed with a material called Nu-Lite, which is manufactured by the Nu-Lite Co., one of the nine organizations which have used the Association's office as a mailing address; that of the 160 loans with original amounts totaling $489,808 which were at the time of the examination in force and which had been granted by the Association for the purpose of financing Jackson Turner construction, 56 totaling $170,200 were delinquent; that seventy-nine of Jackson Turner's loans, including 45 granted to him as a borrower to finance his speculative building operations and 34 granted to various individuals whose homes Jackson Turner had contracted to construct, were seriously over-disbursed; that not included in the foregoing 79 are six loans secured by lots on which no construction had been started at the date of examination; that loan disbursements to Jackson Turner were not supported by either vouchers or invoices; that inspections by Association appraisers had been made at irregular intervals, and the inspection reports were incomplete.

2. Loans to Jackson Turner as Borrower

That at the date of this examination 125 uninsured loans, with unpaid balances totaling $274,461, were outstanding in the name of Jackson Turner; that these loans had been granted for the purpose of financing Jackson Turner's speculative building operations; that fifty of these loans were delinquent; that forty-five were estimated to be over-

disbursed to the extent of $44,272, the Association having available only $39,128 of undisbursed loan proceeds with which to pay estimated construction costs aggregating $83,400; that in forty-one of these cases, the Association advanced the cost of the lot, Mr. Turner's only [14210] equity appearing to be the potential profit, if any, to be derived from a sale of the property.

3. Loans to Various Individuals on Properties Where Jackson Turner was the Contractor

That at the date of this examination 35 loans with unpaid balances totalling $198,406 were outstanding in the names of various individuals whose homes were being constructed by Jackson Turner as a contractor; that 34 of these loans were estimated to be over-disbursed to the extent of $18,658, the Association having available only $25,442 of the individual borrowers' undisbursed loan funds with which to pay estimated construction costs aggregating $44,100; that 27 of these 34 loans had been granted to returning GIs under the provisions of the Servicemen's Readjustment Act of 1944, as amended; that Jackson Turner's contracts with these GIs provided no assurance that the veterans would receive a completed house in any reasonable time and the Association protected the veteran only to the extent of requiring in its deed of trust that "work shall not cease on the construction of such improvements for any reason whatsoever for a period of fifteen (15) days"; that the veteran had been required to pay interest on the full amount

of the loan during the entire construction period, which in some instances had extended for ten to twelve months without the home being ready for occupancy; that in the cases of 21 loans to veterans, a portion of the veterans' funds had been transferred to share accounts in the name of Jackson Turner without the veterans' approval, and eleven of these share accounts were subsequently paid to Jackson Turner without recorded approval by the board of directors.

E. Other Loans granted by Association

1. Moss and Company

That Mike M. Moss, on June 9, 1939, borrowed $125,000 from the Association to finance his purchase of a group of properties from the Bureau of Power and Light of the County of Los Angeles (there were 343 properties in this purchase; the total cost to Mike M. Moss and another purchaser was $251,000 and the Association loaned $250,000 secured by first deeds of trust on 183 of the properties which were improved, of which $125,000 was loaned to Mike M. Moss [14211] and $125,000 was loaned to the other purchaser); that the Moss properties were sold to various individuals under sales contracts which were required to be pledged to the Association, the collections therefrom providing the principal means by which repayment of the $125,000 was expected; that in addition to the pledge of the sales contracts the Mike M. Moss loan was also collaterally secured by a $20,000 note

and deed of trust from Mike M. Moss secured by 112 of the unimproved lots purchased from the Bureau of Power and Light; that Mike M. Moss assigned the various properties to Moss and Company, in which Company Mike M. Moss then was the owner of the entire beneficial interest; that on June 15, 1939, one Joseph Weinblatt acquired a half-interest in the Bureau of Power and Light properties and on August 1, 1939, one George C. Fetterman acquired a tenth-interest; that in April, 1940, Mike M. Moss, Joseph Weinblatt, and T. A. Gregory entered into an oral agreement, as result of which Moss and Company advanced $26,771 and T. A. Gregory advanced $16,586 to Mike M. Moss for the purpose of financing Mike M. Moss on a trip to Mexico to secure various lucrative concessions, such as race track and gambling ventures; that this enterprise lasted until December, 1940; that during the entire period from June, 1939, to December, 1940, the loans to Moss and Company were in poor standing; that prior to April, 1940, only one month's contractual payment was made despite the fact that the properties had been sold to individual contract purchasers, and available records disclose that after April, 1940, the contract collections were largely diverted to finance the Mexican venture in which T. A. Gregory, Mike M. Moss, and Joseph Weinblatt were interested; that this situation continued until the Mexican venture was abandoned in December, 1940; that on December 31, 1940, the Moss and Company indebtedness to

the Association aggregated $197,520 including balances due on the loans secured by the Bureau of Power and Light properties, balances due on loans granted prior to June, 1939, on properties in which Mike M. Moss was interested and miscellaneous other items, including $2,500 additional cash advanced to Mike M. Moss on December 31, 1940, which, according to a sworn deposition by Mike M. Moss, was used by him to return to Mexico; that also at this time the Association released its claim against the lots covered [14212] by the $20,000 deed of trust which it held as additional security; that the effect of the additional $2,500 cash outlay by the Association and the release of the $20,000 deed of trust was to reduce the Association's security for the seriously delinquent loans due from Moss and Company at a time when that company was indebted to T. A. Gregory; that on this same day, December 31, 1940, Mike M. Moss addressed a letter to T. A. Gregory purporting to empower the latter to move the offices of Moss and Company to Long Beach and to name directors to the board of Moss and Company, in order that he, T. A. Gregory, would have representation and could control the assets of Moss and Company; that thereafter collections from the contract purchasers were handled by the Association and from the proceeds of such collections the Association deducted its loan payments, the balance being held in a separate account for the benefit of Moss and Company; that on October 23, 1942, the assets of Moss and Company were assigned by its directors to its creditors; that included among the

creditors were Joseph Weinblatt, T. A. Gregory, George C. Fetterman, and Robert H. Wallis (Mr. Wallis, an attorney in the employ of the Long Beach Federal Savings and Loan Association, occupied rent free space in the Association's office and his secretary was paid by the Association); that on March 24, 1945, Mike M. Moss brought suit against Long Beach Federal Savings and Loan Association, T. A. Gregory, George C. Fetterman, Robert H. Wallis, Joseph Weinblatt, et al.; that Mike M. Moss asked for an accounting, cancellation of instruments and a winding up of the affairs of Moss and Company; that the plaintiff and all of the above-named defendants to this action except the Association sought to establish claims against monies held by the Association for the account of Moss and Company; that a pre-trial settlement of the case was accomplished on January 9, 1946, by the payment to Mike M. Moss of $10,000 out of the monies held by the Association; that funds remaining for the benefit of creditors, after the repayment of the Association's loans, were disbursed as follows: Joseph Weinblatt $16,398, T. A. Gregory $12,887, George C. Fetterman $5,612, and Robert H. Wallis $2,200; that on July 24, 1945, Robert H. Wallis advised the Board of Directors of the Long Beach Federal Savings and Loan Association that in the above suit the Association "will [14213] not sustain any loss"; that Mr. Wallis also stated that the officers of Moss and Company were satisfied with the accounting furnished by the Association

and that Moss and Company's indebtedness to the Association "will be paid in full shortly"; that, between September 4, 1945, and January 19, 1946, the Association disbursed $3,849 to two firms of attorneys in defending this suit; that a representative of the Legal Department of the Federal Home Loan Bank Administration informed affiant that these firms of attorneys both orally stated to him that their only compensation for such services was that received from the Association.

2. Paul Cawood

That a number of loans had been granted to Paul Cawood both by the Long Beach Federal Savings and Loan Association and the First Federal Savings and Loan Association of Bellflower; that these loans were granted when Paul Cawood was under 23 years of age; that, according to J. D. Willhoit, Paul Cawood was a nephew of T. A. Gregory; that these loans were as follows: that on March 3, 1937, Paul Cawood purchased a property and he then executed a deed of trust for $20,000 secured by this property in favor of J. D. Willhoit; that J. D. Willhoit, who orally stated to the examiners that he acted as a "dummy" in this transaction at the request of T. A. Gregory and that the property was purchased for approximately $14,000, immediately assigned this deed of trust to the Association as security for a loan of $20,000; that the appraisal made by T. A. Gregory and Roy Wolfers (vice-president) on which this loan was based valued the property at $30,000; that a mechanic's lien filed

against the property in August, 1937, refers to Paul Cawood, L. N. Schilling (a sister of T. A. Gregory, and a former officer of the Long Beach Federal Savings and Loan Association), T. A. Gregory, and the Association as the reputed owners of the property; that the property was transferred in 1938 by Paul Cawood to one Evadean Henry, who had participated in other real estate transactions with L. H. Schilling; that on May 3, 1946, the loan on this property was repaid, the balance then due being $22,458.60; that three loans were granted by the Long Beach Federal Savings and Loan Association to Paul Cawood in amounts exceeding the respective purchase prices of the properties securing the loans; [14214] that these loans aggregated $7,900 as compared with total purchase prices of $7,575; that the Association's appraisals on which these loans were based totaled $12,800 and were made by T. A. Gregory and Roy Wolfers; that one loan had been granted by the First Federal Savings and Loan Association of Bellflower to Paul Cawood in 1935; that Paul Cawood acquired title to the property securing this loan from J. E. Gregory on the day the loan was granted; that the loan was repaid in 1937 and the property was immediately transferred by Paul Cawood back to J. E. Gregory; that a number of other transactions involving Paul Cawood and L. N. Schilling were financed by the First Federal Savings and Loan Association of Bellflower; that on June 24, 1940, the Association transferred a parcel of real estate which it owned to Paul Cawood for $2,350 and accepted a note and

deed of trust in full payment; that this property was valued at $3,000 in June, 1936, that being the last available appraisal; that Paul Cawood sold this property in 1942 for a consideration of approximately $3,150, according to revenue stamps attached to the deed.

3. Mason E. Kight

That on May 3, 1938, Mason E. Kight acquired title to a property from a local bank for $3,500; that the Association then granted a loan of $3,500 based on an appraisal of $6,000 by T. A. Gregory and Roy Wolfers; that six days before the local bank was paid for the property, out of the loan proceeds, Mason E. Kight executed a deed to T. A. Gregory (no revenue stamps were attached to this deed); that T. A. Gregory occupied the property as his home; that in 1941 he sold the property for $4,250, as compared with the appraised value of $6,000 which he assigned in 1938; that the records of the Association have never disclosed the fact that T. A. Gregory owned this property; that Mason E. Kight acted as a "dummy" in connection with the granting of a loan to J. D. Willhoit secured by a property in which J. D. Willhoit resided; that, except for a war damage insurance policy found in the Association's files, none of its records disclosed J. D. Willhoit's ownership of this property; that in 1939 a state-chartered association, located in Long Beach, was being liquidated; that in connection with the liquidation, twenty-one deeds of [14215] trust were purchased in Mason E. Kight's name; that the

Association loaned $46,688, the full purchase price of these deeds of trust, to finance this transaction, accepting as security a note from Mason E. Kight and a pledge of the twenty-one deeds of trust; that Mason E. Kight's note bore interest at 6.5% and the trust deeds earned interest at an average rate of 6.8%; that the profit on this transaction, $633, representing the differential in interest, was paid to J. D. Willhoit; that J. D. Willhoit stated that Mason E. Kight had acted as "dummy" for him (J. D. Willhoit) in this transaction.

4. Jack and Carolyn Stanaland

That Carolyn Stanaland, a sister of T. A. Gregory and a daughter of J. E. Gregory, was the wife of Jack Stanaland; that Jack and Carolyn Stanaland were vice president and assistant secretary, respectively, of the First Federal Savings and Loan Association of Bellflower whose directors were also directors of the Long Beach Federal Savings and Loan Association; that the Stanalands had obtained six uninsured loans totaling $25,200 from the Long Beach Federal Savings and Loan Association at interest rates from ½% to 1% lower than the prevailing rate charged by the Association on uninsured loans; that four of these loans, which were secured by properties not occupied by the Stanalands as their home, could not have been legally granted under its charter by the First Federal Savings and Loan Association of Bellflower; that the Stanalands had also engaged in other real estate operations which involved the purchase of six prop-

erties from borrowers of the Association subject to existing loans payable to the Long Beach Federal Savings and Loan Association.

5. Du Crete Company

That this company was one of nine organizations which had used the Association's office as a mailing address; that among its principals was one Leland MacArthur, a disbarred California attorney, who had an eighth interest in Du Crete Company; that, according to testimony given before the California State Bar, Leland MacArthur's sole income during 1941 was $200 per month borrowed from T. A. Gregory, at the time Leland MacArthur was promoting Du Crete Company; that three uninsured loans to Du Crete Company were granted during 1941 to finance the construction of twelve houses; that construction of these [14216] houses was not completed and in July, 1942, the Association foreclosed its deeds of trust; that the properties were subsequently sold by the Association without loss; that in an unsuccessful attempt to negotiate a prior sale the Association incorporated provisions to the effect that liens against the defaulting borrower, Du Crete Company, be satisfied out of the sales proceeds.

F. Sales of Loans to Individuals

That between March 1, 1940, and May 18, 1946, the Association sold 286 uninsured loans to various individuals, including 173 to one Merle Reynolds from whom the Association bought its office build-

ing; that these loans, at the date of sale aggregated $579,874, and represented 54% of the last available Association appraisals; that of the 286 loans sold, 90% bore interest at rates of 6% per annum or higher, and 257 were contractually current at the date of sale, 26 were one month delinquent, and the remaining three were only two months delinquent; that all such loans were sold at par, no profit on such sales being reflected on the Association's records; that all loans sold, except nine, were subsequently serviced by the Association for the purchaser, many being serviced without charge to the purchaser, and the remainder being serviced for only 25 cents per payment; that one of the loans sold was secured by a property formerly in the name of Paul Cawood, a nephew of T. A. Gregory according to J. D. Willhoit; that this property was conveyed to Paul Cawood in May, 1937, by a local bank which had acquired it through a foreclosure action against one George S. Baker; that immediately following acquisition Paul Cawood executed a $25,000 deed of trust in favor of L. N. Schilling (sister of T. A. Gregory); that in December, 1937, Paul Cawood transferred the property to one Leva M. Mandy, and the Association granted a $15,000 loan in connection with this transfer, which loan was based on an apraisal of $30,000 by T. A. Gregory and Roy Wolfers; that George S. Baker brought suit against L. N. Schilling, T. A. Gregory, and Paul Cawood, alleging that he (Baker) had called upon T. A. Gregory for assist-

ance in preventing the foreclosure action, alleging that T. A. Gregory had referred him to L. N. Schilling as a real estate broker, alleging that T. A. Gregory did not disclose that L. N. Schilling was his (Gregory's) sister, alleging that subsequently Paul Cawood [14217] became owner of the property, giving L. N. Schilling a $25,000 deed of trust, the proceeds of which were used to purchase the property, and alleging that, as a result of the fraud of T. A. Gregory and L. N. Schilling, he (Baker) had suffered a loss of over $15,000; that in his answer to this suit T. A. Gregory, on October 25, 1938, stated, in two separate instances, that the property was worth $20,250; that, as above noted, T. A. Gregory valued this same property in December, 1937, for $30,000 as a basis for granting a loan to Leva M. Handy; that the suit of the Bakers against T. A. Gregory, et al., never came to trial, a "Dismissal with Prejudice" being entered on December 21, 1938; that Robert H. Wallis, the Association's attorney, resided in this property, a small apartment house; that it had been operated by Association employees since 1941, and was referred to on invoices in the Association's files as the "Wallis Apartments"; that the loan to Leva M. Handy was sold by the Association in February, 1946.

Real Estate Sales

7. That the Association had effected 56 sales of real estate from January 1, 1938, to the date of the examination; that, based on the last available appraisals, 55 of these properties were sold for

amounts $36,420 less than the valuations assigned by the Association's appraisers; that the aggregate sales prices totaled $127,597, of which only $18,001 represented cash, the balances being financed by the Association for the purchasers; that included among these sales were thirteen properties sold to J. D. Willhoit for $24,822 which properties were sold by him to various individuals for $34,380, J. D. Willhoit's potential profit being $9,558; that the sales by J. D. Willhoit were all effected within very short periods of time after he acquired the properties; that also included among the 56 sales was one which J. D. Willhoit sold as a broker for the Association, and on which he was paid a commission of 14% of the sales price; that four of the 56 sales were made to Association employees; that these properties were sold at their aproximate cost to the Association, $10,650, as compared with their appraised values of $14,000, and in each instance the employee purchaser financed the entire purchase by giving the Association a note and deed of trust in an amount equal [14218] to the purchase price; that two of these properties which had been sold by the Association for $5,350 were subsequently resold by the employee for $6,800; that one of these properties was conveyed by the Association to a "dummy" for. Vice President Ethel L. Roberts, and was then conveyed by this "dummy" to Mrs. Roberts; that this property was sold for $3,000 as compared with the Association's valuation of $4,200; that the property in question was the home of Mrs. Roberts; that,

in addition to properties heretofore discussed, seven were sold by the Association to individual purchasers for $16,157, who within periods not exceeding one year, resold the properties to other persons for $19,355.

Inadequately Explained and/or Questioned Expenses

8. A. In General

That the Association's records do not reveal sufficient information in numerous instances to permit of a determination as to the propriety, as a charge against the Association, of many of the expenses which it has paid; that it also appears that certain legal fees had been improperly charged against the Association; that invoices were not in the files to support many of the items paid, and Association vouchers were often missing or the explanations of expenses appearing thereon were either lacking or inadequate; that where expenses were supported by either vouchers or invoices it was found that frequently approval of the payment was not indicated on either the voucher or the invoice; that in those cases where the items were supported by approved vouchers or invoices such approvals were usually given by T. A. Gregory or Ethel L. Roberts; that approvals of expenses by the Board of Directors consisted of ratifying a monthly statement of such expenses which merely indicated the total of each class of expense, by account title, during the preceding month without indicating the identity of the payee or specific information as to the purpose

of the disbursement; that such expenses, i.e., those which were either inadequately explained or questioned, had been classified into four groups, each of which will be discussed separately in the following paragraphs.

B. Disbursements to Gasoline Service Stations.

That between January, 1943, and June, 1945, expenses were paid by check to [14219] several gasoline service stations amounting to $7,050; that the majority of these checks were endorsed by Leland MacArthur and many were cashed by the Association; that Leland MacArthur, a disbarred attorney, who was active in local politics, was connected with the Du Crete Company as heretofore noted; that among disbursements to these service stations were such items as $276 paid May 23, 1944, for "Gal. 1400"; $250 paid June 2, 1944, "on acct. adv. purchased"; and $270 paid July 7, 1944, for "1500 gal. Hi Octane @ 18c"; and $800 paid June 13, 1945, for 4000 gallons of gasoline; that at no time during this period had the Association owned more than seven automobiles.

C. Disbursements Involving Lorne D. Middough

That between July, 1943, and May, 1946, expenses totaling $3,275 were paid by check to Lorne D. Middough or to either of two organizations with which he was connected, namely, the Future Citizens Foundation and the Novelty Advertising Company.

or on behalf of one of them; that Mr. Middough represented the 70th California District in the State Legislature and the two organizations named operated from the office building owned by the Association; that among the disbursements made to either Lorne D. Middough or the organizations named were such items as $176 paid to the Future Citizens Foundation in 1943 explained as "for services rendered and expenses week of Oct. 17th;" $169 paid in 1945 to Novelty Advertising Company explained as "Advertising and mailing charges," and $283 paid in 1945 for "Government postal cards, printing and addressing as per agreement;" that a copy of the agreement referred to could not be found.

D. Legal Fees

That between January, 1938, and May, 1946, fees totaling $13,779 were paid to fifteen attorneys, including the fees paid in the Moss and Company case heretofore discussed; that at least $4,737 in fees were paid in connection with matters in which the Association had no apparent interest; that in many instances these fees were paid in matters involving either T. A. Gregory or L. N. Schilling.

E. Other Inadequately Explained or Questioned Expenses

That in this group are included various expenses paid between 1938 and 1946 which total $7,305; that such items included $69 paid in 1943 in connection with the settlement of the estate of former

Director J. S. Watts, $300 paid in 1943 to one Mrs. C. V. Langley "In full settlement of all claims against S. I. Bacon and Mrs. Leland Atherton Irish as per settlement of claim," and two amounts of $100 each paid in May, 1945, and April, 1946, to a Dr. John S. Crowder explained as "Services rendered for advertising" and "Services rendered."

Billboard Advertising

9. That nine billboards rented by the Association were used for political advertising on behalf of two candidates for election in the California primary election held on June 3, 1946; that no authority for the use of the billboards for this purpose could be found in the Association's records; that reimbursement of the expense incurred by the Association for the use of these billboards was effected on May 20, 1946, in the form of cash given to one of the Association's tellers by Ethel L. Roberts with instructions to enter the same as "Reimbursement for Release of Billboard Advertising for period of three weeks ending June 5, 1946."

Travel and Legal Expenses Incurred by T. A. Gregory

10. That, from September 11, 1945, to March 7, 1946, expenses in the total amount of $16,905 were incurred by Thomas A. Gregory; that of this amount $14,500 was charged to travel expense and $2,405 was charged to legal services; that except as hereinafter noted the Association's files contained no explanation as to the nature of the services rendered; that the legal expense of $2,405 was paid to

Howard S. Leroy, an attorney in Washington, D.C.; that the minutes of the meeting of the board of directors held on March 13, 1946, after all of these expenses had been disbursed, set forth that Mr. Gregory incurred the expenses in connection with his activities as a member of a committee appointed by the board of directors of the Federal Home Loan Bank of Los Angeles; that the board of directors of the Association had approved his trips to Washington and the payment of legal expenses to Mr. Leroy; that Mr. Gregory was reported in the minutes to have stated that in his judgment all the expenses were properly chargable to the Association, [14221] but nevertheless he wished to reimburse the Association for such expenses; that the board of directors was reported in the minutes to have reluctantly agreed to his doing so; that the minutes of the meeting of the board of directors held on January 16, 1946, stated that Thomas A. Gregory "shall be paid extra compensation for his services as President of the Association during the year 1945 the sum of $11,750.00," and further, "that effective January 1, 1946, the annual compensation of T. A. Gregory as President of the Association be and the same is hereby fixed at the sum of $20,000;" that pursuant to the foregoing resolution T. A. Gregory was to be paid $11,750 for 1945 and $2,356 for the first three months in 1946, or a total of $14,106; that this amount, $14,106, was applied against the expenses incurred by T. A. Gregory of $16,905, leaving a balance of $2,799 which sum was paid in cash; that

these entries were not recorded until April, 1946, although the compensation increase was reported in the minutes to have been approved in January, three months earlier; that the rules and regulations require Federal savings and loan associations to file monthly reports showing their financial condition; that such reports were filed by this Association as of the end of January, February, and March, 1946, over the signature of Ethel L. Roberts, vice president and assistant secretary; that these reports do not reflect the liability for increased compensation to T. A. Gregory approved by the board of directors on January 16, 1946, which on March 31, 1946, had accumulated to $14,687.

Resolutions Recorded in Minutes of Board of Directors Dated May 8, 1946

11. A. Attendance

That at the meeting of the board of directors of the Association, held on May 8, 1946, all directors were present according to the minutes which were signed by J. E. Gregory and no dissenting votes were shown.

B. Leasing of Rolston Hotel

That on December 31, 1940, the Association purchased an office building from one Merle Reynolds for a consideration of $110,000; that this property was conveyed by Merle Reynolds to the Somerset Finance Corporation, of which S. I. Bacon and T. A. Gregory were Vice President and Secretary, respectively, and that corporation conveyed the

property to the Association; that the [14222] purpose of the conveyance to the Somerset Finance Corporation is not clear; that the building had three stories with three store fronts on American Avenue and two separate stores in the rear facing on a small alley; that two of the American Avenue stores were used by the Association as its office quarters; that the third store on American Avenue was used as the lobby of the Rolston Hotel, which hotel also included eighty rooms on the second and third floors; that one of the alley stores was occupied by J. D. Willhoit, and the other by a sign painter; that from the date of purchase the Association operated the hotel, deriving net income as follows:

1941	$ 6,125
1942	9,520
1943	14,247
1944	19,808
1945	20,641
1946	$6,374 (to May 8);

that in 1942 the Federal Home Loan Bank Administration informed the Association that the "ownership and operation of a hotel business is not incidental to the express or implied powers of the association" and directed that the Association "should be divested of this ownership and operation as promptly as can be done without injury to the association;" that in reply to this supervisory direction the board of directors adopted a resolution which is quoted in part as follows:

> "The matter resolved itself down to the association doing one of three things (1) sublet the hotel, in which event it would have all of the liabilities for accidents or damage suits almost to the same extent it has now; (2) close the hotel; (3) continue to operate it until some other satisfactory solution can be found.
>
> "It appeared to be the opinion of all those present that the third solution was the only one that could be properly followed * * * ";

that the minutes of May 8, 1946, contain a resolution authorizing the leasing of the Hotel Rolston to one George Turner (Mr. Turner in 1946 purchased a business known as the Crystal Radio and Engineering Company from T. A. Gregory); that one section of this resolution states that "the income from the hotel shows a continuing decrease and it appears that it will be down to a nominal sum in the very near future * * * "; that this statement is not supported by the [14223] net income figures set forth above; that the lease was for a period of twenty years beginning May 8, 1946, at a rental of 50% of the net proceeds from the property after the payment of expenses, costs and charges; that the lease further provided that the "Lessee shall be the sole and exclusive judge of management and expenditures made hereunder; and that said Lessor shall be entitled only to an accounting and the payment of one-half (½) of the proceeds from said property monthly;" that J. D. Willhoit orally stated to the examiners that he had

been offered a lease on this hotel by T. A. Gregory a day or two after May 15, 1946; that, furthermore, the hotel manager had received no instructions to discontinue his usual practice of remitting the hotel room rents daily to the Association until May 20, 1946, although the effective date of the lease was May 8, 1946.

C. Lease of Two Alley Stores to J. D. Willhoit

That J. D. Willhoit occupied a small store in the rear of the Association's office building for several years prior to May 15, 1946; that this space was given to Willhoit rent free by the Association; that an adjoining store was occupied by a sign painter who paid the Association $12.50 per month on a month-to-month basis; that the minutes, dated May 8, 1946, contained a resolution approving a lease to J. D. Willhoit for a ten-year term at a monthly rental of $30.00 for the two stores, one of which was occupied by J. D. Willhoit and one by the sign painter; that the effective date of this lease was May 15, 1946; that, according to an oral statement made to the examiners by J. D. Willhoit, he knew nothing of this lease until May 15, 1946, on which day he was offered the opportunity to rent the space by T. A. Gregory.

D. $100,000.00 Resolution

That the minutes of the board of directors, dated May 8, 1946, contained a resolution appropriating a sum of $100,000 which provided that "the officers

of this association be and they are hereby authorized to employ legal counsel to conduct appropriate legal proceedings to restrain said Federal Home Loan Bank Commissioner or his deputies from interfering with the normal and proper conduct of this association's affairs * * * ''; that this examination was started at noon on Saturday, May 18, 1946, after the close of business; that [14224] included in one of the teller's cash drawers was a cashier's check payable to the Association in the amount of $50,000, which had been obtained in exchange for a check of the Association in like amount; that upon inquiry by the examiners, T. A. Gregory stated that this cashier's check was to be used to purchase building materials for one of the contractors whose operations were being financed by the Association; that subsequent inquiry and investigation revealed that the said cashier's check was given to the teller by Ethel L. Roberts immediately after the arrival of the examiners, and before the cash was counted, and that shortly after the cash count was completed T. A. Gregory asked the teller to return the check to him and this was done; that on Monday, May 20, 1946, after the appointment of a conservator by the Federal Home Loan Bank Administration, S. I. Bacon exchanged the said cashier's check at the Association's depository for another cashier's check in like amount payable to the order of Robert H. Wallis, attorney for the Association.

Issuance of 21,000 Share Accounts

12. That on May 18, 1946, at the time this examination was started, the Association's employees were in the process of issuing 21,000 share accounts in the amount of one dollar each; that due to a shortage of supplies the usual bookkeeping records had not been established, and the examiners were furnished with typewritten lists showing the account numbers to be assigned to each such share account and the names of the persons to whom they were to be issued; that these lists indicated that fifty accounts of one dollar each were to be issued in the name of J. E. Gregory, S. I. Bacon, Mrs. S. I. Bacon, T. A. Gregory, and M. T. Killingsworth, as individual trustees for various persons, or in pairs with each other or other persons, as joint trustees for various persons; that except for $100 all of the funds necessary to purchase the said 21,000 accounts came from repurchases of other share accounts in the Association belonging to the individuals named, or from Title Service Company, and Pacific Insurance Agency.

Appointment of Conservator

13. That the examination and audit was started at noon on Saturday, [14225] May 18, 1946, at the close of business; that, before the opening of business on Monday, May 20, 1946, a conservator, appointed by order of the Federal Home Loan Bank Administration, took possession of the Association; that during the course of the examination and audit

it was necessary to refer to information previously furnished to the supervisory authorities, in writing, by T. A. Gregory, and it was noted that many of the statements made by T. A. Gregory were of an equivocal nature; that as the examination and audit approached a conclusion T. A. Gregory was requested to discuss the matters covered by the examination and audit report, but declined to do so except on the basis that any questions be submitted to him in writing; that this procedure would have resulted in endless correspondence over a prolonged period of time, thereby rendering such a program impractical; that from time to time during affiant's examination of said Association, commencing on said May 18, 1946, said affiant reported facts revealed and discovered in the course of said examination, as in this affidavit set forth, to the Federal Home Loan Bank Administration.

/s/ R. J. STRECKER.

Subscribed and sworn to before me this twenty-second day of April, 1949.

[Seal] /s/ PAUL PFEIFFER, JR.,
Notary Public.

My Commission expires Oct. 15, 1952.

[Endorsed]: Filed March 20, 1950. [14226]

[Title of District Court and Cause.]

District of Columbia—ss.

AFFIDAVIT OF JOHN M. WYMAN

John M. Wyman, being first duly sworn on oath, deposes and says:

I.

That he is Chief Supervisor, employed by the Home Loan Bank Board and that under the regulations and direction of said Board he is responsible for the [14228] supervision of all Federal savings and loan associations and for the analysis of all reports of supervisory examinations. That he has occupied such position for nearly fourteen years.

II.

(1) That in the month of July, 1945, the supervisory examination of defendants and cross-complainant Long Beach Federal Savings and Loan Association was made by examiners of the Federal Home Loan Bank Administration and that within a few months following said examination said examiners made a report thereof.

(2) That this report showed said Association had paid to one John D. Willhoit a sum in excess of $312,000 representing net proceeds of payments on real estate contracts which had been purchased by said John D. Willhoit from one E. N. Frame, the total consideration for which had been loaned to said John D. Willhoit by said Association, but that said Association had received no part of any net proceeds of collections under said real estate

contracts notwithstanding the fact that said Association had a proprietary interest in such net proceeds by virtue of a certain agreement between said John D. Willhoit and T. A. Gregory, President of said Association and acting on its behalf.

(3) That, because of said agreement and proprietary interest and because the said proprietary interest was not recorded as an asset of the said Association, affiant advised Harold Lee, Governor of the Federal Home Loan Bank System, and John H. Fahey, Federal Home Loan Bank Commissioner, that the payment to said Willhoit by said Association of more than $312,000 of net proceeds from the said contracts without the payment of any net proceeds from such contracts to the Association raised a question as to the disposition, and as to possible misuse, of such asset.

III.

That affiant on or about the 1st day of March, 1946, informed said Harold Lee and John H. Fahey that said Association had failed to file copies of the audit of said Association made by F. W. LaFrentz & Company, certified public accountants of Los Angeles, California, as of the close of business on [14229] May 19, 1945, or thereabouts, as required by Section 203.2 of the Rules and Regulations for the Federal Savings and Loan System.

IV.

That affiant on or about said 1st day of March, 1946, further stated and reported to said Commissioner John H. Fahey and said Governor Harold

Lee the fact that affiant had previously informed them regarding said T. A. Gregory's activities in connection with the Reliable Building-Loan Association of Long Beach, California, as follows:

(1) That sometime during the year 1945 affiant had been informed for the first time that said Gregory had during the year 1934 acquired control of said Reliable Building-Loan Association through the purchase of stock of said Association and had assumed the management thereof.

(2) That said T. A. Gregory and his father, J. E. Gregory, also owned all or approximately all of the stock of the Somerset Finance Company located at Bellflower, California.

(3) That between March 17, 1934, and May 7, 1934, the Somerset Finance Company purchased through brokers at a total cost of $11,120.29 Reliable Building-Loan certificates having a face value of $27,683.39.

(4) That, although these certificates were thus acquired by the said Gregorys at prices ranging from 35½ to 45 cents on the dollar, the Gregorys cashed these certificates at the Reliable Building-Loan Association at 100 cents on the dollar.

(5) That at the time of purchasing said certificates and cashing the same through said Reliable Building-Loan Association and while in full control of the management of said Reliable Building-Loan Association said Gregorys refused to cash certificates of other certificate holders of the Reliable Building-

Loan Association, thus forcing such other certificate holders and depositors to sell their certificates on the open market at prices far below their face value.

(6) That while said Gregorys were thus buying said certificates of said Reliable Building-Loan Association at prices ranging from 35½ to 45 cents on the dollar, said Reliable Building-Loan Association, through said [14230] T. A. Gregory, rendered quarterly reports to the California Building and Loan Commissioner as of March 31, June 30, and September 29, 1934, which said quarterly reports showed the Association's investment certificates to be worth 100 cents on the dollar.

(7) That each of said quarterly reports included a certification signed by said T. A. Gregory which stated:

> "The undersigned, first being duly sworn, each deposes and says: That he has read the foregoing and within report, and that to the best of his belief and knowledge, the assets are set forth therein at their true value, all known liabilities including accrued and contingent liabilities are set forth therein, provision has been made for all known or probable losses by writing same off or setting up special reserves therefor, no information has been withheld and all information requested by this report has been given, and all other matters therein set forth are correctly stated."

(8) That at the time of filing his application for permission to organize a Federal savings and loan

association, to wit on the 15th day of May, 1934, said T. A. Gregory represented to the Federal Home Loan Bank Board that he was a person of good character and responsibility and made no disclosure in said application of the facts hereinabove set forth.

V.

(1) That prior to the 18th day of March, 1946, affiant recommended to said Harold Lee and John H. Fahey that a further examination be made of said Long Beach Federal Savings and Loan Association.

(2) That accordingly a limited special examination of said Association was made on or about April 23, 1946; that following said examination of April 23, 1946, a report thereof was made by the examiners; that said report set forth, among other things, the following:

(a) During the period from September 11, 1945, to March 7, 1946, disbursements of funds of said Association totaling $14,500 were made to its President, T. A. Gregory, without proper voucher therefor, or explanation thereof in the records of the Association, itemized as [14231] follows:

9/11/45	T. A. Gregory	$1,000.00
10/22/45	Wired to T. A. Gregory, Wash., D. C.	1,000.00
11/ 5/45	Wired to T. A. Gregory, Wash., D. C.	1,000.00
11/24/45	T. A. Gregory	1,000.00
12/ 1/45	Wired to T. A. Gregory, Wash., D. C.	2,000.00
1/19/46	T. A. Gregory	2,000.00
1/31/46	Cash (Wired to T. A. Gregory)	1,500.00
2/20/46	Cash (Wired to T. A. Gregory at Wash., D. C.)	2,000.00
2/28/46	Cash (Wired to T. A. Gregory at Wash., D. C.)	2,000.00
3/ 7/46	Cash (Wired to T. A. Gregory at Wash., D. C.)	1,000.00
	Total	$14,500.00

(b) Funds of the said Association totaling $2,455.60 were disbursed to Howard S. Leroy, an attorney at law at Washington, District of Columbia, on or about January 30, 1946, January 31, 1946, and March 6, 1946, although said attorney had not been retained by the said Association, nor were such funds paid to said attorney for the handling of any business of the said Association, or otherwise for the benefit of said Association.

(c) The board of directors of said Association attempted in the following manner to relieve T. A. Gregory from accountability to the said Association for its funds used by him for purposes beyond the scope of the said Association's business:

(i) The said Board of Directors, according

to the minutes of a special meeting dated January 16, 1946, voted to compensate T. A. Gregory retroactively in the sum of $11,750 for services rendered by him in 1945, for which the said T. A. Gregory had already been paid in accordance with the terms of his employment.

(ii) The said Board of Directors, according to the minutes of the special meeting, dated January 16, 1946, voted to increase T. A. Gregory's salary from $8,250 to $20,000 per year, effective January 1, 1946.

(iii) On April 6, 1946, reimbursement of said Association's funds paid to T. A. Gregory and used by him for purposes beyond the scope of the Association's business, was recorded on the books of said Association by means of an offset against the purported liability [14232] of the Association to T. A. Gregory for the said sum of $11,750 and for the voted increase for the first three months of 1946.

(d) The records or statements of the Association were untrue in that either

(i) The minutes of the Board of Director's meeting of January 16, 1946, had been falsified by the entry therein of action purported to have been taken by said Board on that date increasing T. A. Gregory's salary from $8,250 to $20,000 per year and authorizing the payment of $11,750 to T. A. Gregory as extra compensation for the year 1945;

or

(ii) The said Association's liabilities were

misrepresented to the Federal Home Loan Bank Administration by monthly reports filed by said Association with said Administration for the months ending January 31, 1946, February 28, 1946, and March 30, 1946, because said reports did not disclose any liability to said T. A. Gregory for the amounts purportedly voted to him on January 16, 1946.

(3) That affiant immediately upon receipt of said report advised John H. Fahey and Harold Lee of the facts hereinabove set forth and the full contents and information contained in said report and each and every part thereof.

VI.

(1) That thereafter and sometime during the early part of May, 1946, affiant was instructed by said John H. Fahey and Harold Lee to direct a further examination and an audit of the books and records and affairs of said Association.

(2) That accordingly affiant directed that such examination and audit be made and such examination was commenced as of the close of business May 18th, 1946.

(3) That said examination and audit was commenced at noon of said date and that at the approximate hour of 11 p.m. on said date the examiners designated to make said examination and audit reported to A. V. Ammann, Assistant Chief Supervisor for said Federal Home Loan Bank Adminis-

tration certain facts which [14233] they had then discovered in the course of their examination.

(4) That as a result of said report said A. V. Ammann did, on the 19th day of May, 1946, report by telephone to Ray E. Dougherty, Associate General Counsel for the Federal Home Loan Bank Administration, the contents of said report, which was substantially as follows:

(a) The Board of Directors of said Association on May 8, 1946, appropriated the sum of $100,000 of the funds of said Association for the purpose of instituting litigation against the Federal Home Loan Bank Administration, and threatened the removal of said sum from the proper control of said Association.

(b) Certain directors of said Association, namely: T. A. Gregory, J. E. Gregory, M. T. Killingsworth and S. I. Bacon, on or about May 18, 1946, were in the act of converting their shareholdings and other funds totaling approximately $21,000 into approximately 21,000 separate share accounts of $1.00 each for the purpose of obtaining a greater voting power on matters requiring approval by the Association's members as provided by the Association's charter and the Rules and Regulations for the Federal Savings and Loan System.

(5) That on May 19, 1946, at about the hour of 11:00 a.m., the said Ray E. Dougherty advised the said Harold Lee, affiant and others, at a meeting held at that hour in the offices of the Federal Home Loan Bank Administration in Washington, D. C.,

of the facts hereinabove set forth as telephoned to him, said Ray E. Dougherty, by said A. V. Ammann.

VII.

That said examination and audit was further continued following said 18th day of May, 1946, and on the 20th day of May, 1946, said examiners reported that during the course of the regular examination and the audit commenced on May 18, 1946, they found that a director and officer of said Association had, without accounting therefor or making any record of such removal, removed a cashier's check in the amount of $50,000 payable to said Association and representing funds belonging to it. [13234]

VIII.

That following the appointment of the conservator for the said Association said examination and audit continued for a period of several months and during the course of said examination and audit, the following transactions, among others, by the directors and officers of said Association were disclosed:

(1) The Title Service Company, owned by directors of the said Association as individuals, and Pacific Insurance Agency, owned by T. A. Gregory, President of said Association, as an individual, used space and personnel provided by said Association without paying the Association any compensation therefor; no part of the income derived by either Title Service Company or Pacific Insurance Agency was paid to the said Association; the aggregate annual salary of employee of the Association who also

served Title Service Company and Pacific Insurance Agency was $37,900.00 as of May 18, 1946; said Association's funds were thus directly used for the personal benefit of T. A. Gregory and of other directors of said Association.

(2) In October, 1941, said Association, without consideration to it, discontinued charging one of its borrowers, John D. Willhoit, a collection fee of 25c for each payment received by it from each of several hundred individuals who had purchased from said Willhoit the properties underlying the Association's loans to him; that the consideration for discontinuing the 25c collection charge was that all escrow fees and all fire insurance business arising from the properties underlying the said loans would inure to the benefit of the Title Service Company and Pacific Insurance Agency, respectively, there being no consideration whatever to the Association.

(3) Between September 4, 1945, and January 19, 1946, said Association disbursed $3,849.00 to pay for legal services rendered principally to T. A. Gregory as an individual in defending a lawsuit against T. A. Gregory, individually, in which the Association was only a nominal party; the Association had previously been advised by its attorney that the Association "will not sustain any loss" in connection with the said suit; T. A. Gregory had substantial personal financial interest in the defense of the lawsuit, which personal [14235] interest was not connected with said Association.

(4) Said Association purchased an office build-

ing, which included a hotel, on December 31, 1940, for the sum of $110,000; in May, 1946, the Association leased said hotel to one George Turner for a term of 20 years for a consideration of one-half of the net proceeds realized from its operation; the resolution by said Association's Board of Directors approving this lease was grounded in part on the statement in such resolution that "the income from the hotel shows a continuing decrease and it appears that it will be down to a nominal sum in the very near future;" the net income derived by the Association by operating such hotel had, in fact, shown a steady increase, as the following schedule of net income discloses:

1941	$ 6,125.00
1942	9,520.00
1943	14,247.00
1944	19,808.00
1945	20,641.00
1946	$6,374.00 (to May 8);

by the terms of said lease the Association forfeited any real control over the income from the property and left such income completely to the mercy of the lessee, inasmuch as the said lease provided that the "Lessee shall be the sole and exclusive judge of management and expenditures made hereunder; and that said Lessor shall be entitled only to an accounting and the payment of one-half (½) of the proceeds from said property monthly."

(5) During the years 1938 to 1941, inclusive, the Association made loans to two borrowers aggre-

gating more than $3,800,000, which amount was more than 47% of the total amount of loans on the Association's books at December 31, 1941; an additional sum of $487,200 was loaned in 1942 to one of these borrowers, making the total amount loaned to them approximately $4,287,000, which amount was slightly less than 59% of the total amount of loans held by the Association at December 31, 1942; neither of these two borrowers had any real equity in the properties underlying the Association's loans; the amount loaned by the Association to one of these borrowers, in the original amount of $1,510,975 to finance the construction of 892 houses, was not only sufficient to defray the entire cost of acquiring and improving the land and of [14236] constructing the houses, but was also sufficient to provide for the payment of title expenses, interest on the loans during construction, and fire insurance premiums, and, in addition, was sufficient to provide for the payment of fees equal to approximately 17% of the amount loaned.

(6) Shortly before the appointment of a conservator, the Association made numerous construction loans to one Jackson Turner, or to borrowers, most of whom were veterans, for whom Jackson Turner had contracted to build homes; in many instances the said Jackson Turner loan accounts had been substantially overdrawn; disbursements of the proceeds of the said Jackson Turner loans were made by the Association without adequate inspection and reports as to the progress of construction; sub-

stantially more funds than were initially loaned and advanced by the Association were necessary to complete the construction of the properties by said Jackson Turner; in connection with twenty-one of the Jackson Turner construction loans a portion of the veterans' funds was transferred to share accounts of said Association in the name of Jackson Turner without approval by the veteran in any instance, and eleven of these share accounts were subsequently paid to Jackson Turner by said Association.

(7) Notwithstanding the provision in said Association's charter which, in the interest of the individual home owner and of the general public, permits each borrower to prepay his loan at any time, said Association under the management of the said T. A. Gregory loaned a large amount of money at an interest rate of 4½% to building concerns for the construction of many homes to be sold at a profit by such concerns on contract for deed at an interest rate of 6% or 6½% and with contract provisions which prohibited prepayment and prohibited the assignment or transfer of the vendee's interest without the consent of the vendor, which consent was generally denied or given only upon payment of a bonus; many of these properties were sold to war workers who were obliged to acquire shelter under the compulsions of national necessity and a severe housing shortage.

(8) In order to qualify for insurance under Title VI of the National Housing Act, one C. J. Jones, Long Beach, California, on or about April

16, 1941, represented to the Federal Housing Administration that his assets [14237] included "Cash in Long Beach Federal Savings & Loan Association pledged as bond until completion of construction . . . $100,000.00;" the said C. J. Jones did not on April 16, 1941, nor at any date approximate thereto, have in said Association $100,000 or any approximate amount of "cash * * * pledged as bond until completion of construction" or any equivalent thereof; on or about April 17, 1941, said T. A. Gregory, as President of the Long Beach Federal Savings and Loan Association, transmitted and submitted to the Federal Housing Administration a copy of the financial statement of C. J. Jones of April 16, 1941, wherein C. J. Jones represented, as above stated, that he had $100,000 in cash in the Long Beach Federal Savings and Loan Association pledged as bond until completion of construction; in transmitting and submitting the said financial statement to the Federal Housing Administration said T. A. Gregory stated, among other things, that: "An analysis of his Financial Statement will demonstrate to you that he has pledged with this institution a $100,000 guarantee to carry to completion the proposed project;" on June 19, 1941, the Federal Housing Administration advised said Association, among other things, that the said C. J. Jones must "establish a $100,000 cash bond with the mortgagee to guarantee the completion of the proposed project;" on June 21, 1941, the said T. A. Gregory stated to the Federal Housing Administration in writing that: "This will confirm that the applicant,

Mr. C. J. Jones, has executed and delivered to this institution an agreement pledging the sum of $100,000.00 as a guarantee for the completion of any building started under the Title VI application, together with the said sum pledged under the agreement;" on the strength of the aforesaid letter of June 21, 1941, to the Federal Housing Administration, the Federal Housing Administration on that date approved the use of its commitments to insure certain loans by the Long Beach Federal Savings and Loan Association to the said C. J. Jones; the Association did not on June 21, 1941, have $100,000 or any other sum in cash pledged by the said C. J. Jones to guarantee completion of the construction project; affiant is informed that in the course of the said examination, which was commenced May 18, 1946, there was found in the Association's files a check, dated June 23, 1941, drawn on the First and Pine Avenue Branch of [14238] the Bank of America payable to "Long Beach Federal Bld. & Loan [sic] in the amount of $100,000 signed by the said C. J. Jones; the said check had not been endorsed or presented for payment; affiant is informed that the said C. J. Jones did not at any time in the month of June, 1941, have $100,000 in the First and Pine Avenue Branch of the Bank of America, but that the highest balance that C. J. Jones had in said branch of said bank in the month of June, 1941, was $172.80.

/s/ JOHN M. WYMAN.

Subscribed and sworn to before me this nineteenth day of April, 1949.

[Seal] /s/ PAUL PFEIFFER, JR.,
Notary Public.

My commission expires Oct. 15, 1952. [14239]

Copy of Affidavit of John M. Wyman received March 20, 1950.

/s/ W. I. GILBERT, JR.,
Attorney for First Federal of Wilmington.

O'MELVENY & MYER,
Plaintiffs in F.H.L.B., L.A. vs. F.H.L.B., S.F.

/s/ CHARLES K. CHAPMAN,
Attorney for Long Beach Federal.

WESTOVER & SMITH,

By /s/ WYCKOFF WESTOVER,
Attorney for Plaintiff in 5421 P.H.

BISHOP & HOFFMAN,
VERNE DUSENBERY,
PHILIP ANGELL,

By /s/ IRVING G. BISHOP.

[Endorsed]: Filed March 30, 1950. [14240]

[Title of District Court and Cause.]

AFFIDAVIT OF IRVING BOGARDUS FILED ON BEHALF OF DEFENDANT, CROSS-DEFENDANT AND THIRD PARTY DEFENDANT, FEDERAL HOME LOAN BANK OF SAN FRANCISCO, IN OPPOSITION TO MOTIONS OF PLAINTIFFS IN ACTION NO. 5678 FOR ORDER DIRECTING PAYMENT OF ATTORNEYS' FEES ON ACCOUNT AND FOR ORDER DIRECTING REPAYMENT OF MONEYS ADVANCED BY SHAREHOLDERS PROTECTIVE COMMITTEE AND MOTION OF FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF WILMINGTON, ET AL., FOR ATTORNEYS' FEES ON ACCOUNT AND COSTS [14241]

State of California,
City and County of San Francisco—ss.

Irving Bogardus, being first duly sworn, deposes and says:

That since the 29th day of March, 1946, your affiant has been and now is a duly elected, qualified and acting Vice President of the Federal Home Loan Bank of San Francisco, one of the defendants, cross-defendants and third party defendants in the above-entitled action; that said affiant was the duly appointed Acting President of said Federal Home Loan Bank of San Francisco from approximately the month of August, 1949, to and including the

9th day of March, 1950; that said affiant makes this affidavit for and on behalf of said Federal Home Loan Bank of San Francisco in opposition to the motion and petition of plaintiff First Federal Savings and Loan Association of Wilmington for allowance of attorneys' fees and costs in the above-entitled actions, and the petition of plaintiffs in action No. 5678 for order directing payment of attorneys' fees on account and for order directing repayment of moneys advanced by Shareholders Protective Committee. Affiant is informed and believes and upon such information and belief states that all of the facts set forth in all affidavits filed by or on behalf of all defendants, cross-defendants and third party defendants in the above-entitled actions, and each one thereof, including all affidavits filed by or on behalf of the United States of America, Home Loan Bank Board, A. V. Ammann, John H. Fahey, William K. Divers, O. K. LaRoque and J. Alston Adams, in opposition to the motion and petition of plaintiffs in action No. 5678 for order directing payment of attorneys' [14242] fees on account and for an order directing repayment of moneys advanced by Shareholders Protective Committee, and motion and petition of plaintiff First Federal Savings and Loan Association of Wilmington for allowance of attorneys' fees and costs, are true, and basing his statement herein upon such information and belief states that all of the facts set forth in said affidavits are true and correct and by this reference adopts said statements with like

force and effect as if the same were herein set forth in full.

Affiant further states that he has read the affidavits of J. Howard Edgerton, Tracy Skelton and T. A. Gregory in support of motions of plaintiffs in action No. 5678 for order directing payment of attorneys' fees on account and for order directing repayment of moneys advanced by Shareholders Protective Committee and motion and petition of plaintiff First Federal Savings and Loan Association of Wilmington for allowance of attorneys' fees and costs. Affiant states that at no time has any Federal Savings and Loan Association, or any other Savings and Loan Association or any person, firm or corporation doing business with said Federal Home Loan Bank of San Francisco, been compelled or required to do business with said Federal Home Loan Bank of San Francisco, or purchase stock of said Federal Home Loan Bank of San Francisco by reason of business or economic compulsion or duress or any compulsion or duress of any kind or nature; that all persons, firms or corporations doing business of any kind or nature with said Federal Home Loan Bank of San Francisco did so as its or their own free and voluntary act and without any coercion, compulsion or duress of any kind or character. [14243]

Answering the statements of said J. Howard Edgerton commencing on page 8, line 12, and ending on page 10, line 10 of said affidavit of said J. Howard Edgerton, affiant refers to and incorporates

herein by this reference each and all of the allegations of Amended Return of Federal Home Loan Bank of San Francisco, William A. Davis and Gerrit Vander Ende to Order to Show Cause Returnable August 16, 1948, and Answer and Objections to Petition and Motion Upon Which Order to Show Cause Is Based on file in the above-entitled consolidated actions. Affiant further states that said affiant is informed and believes, and upon such information and belief states that at no time whatsoever has John H. Fahey as Federal Home Loan Bank Commissioner or otherwise, or any officer, employee or representative of said John H. Fahey as such Federal Home Loan Bank Commissioner or otherwise, or any member, officer or employee of said Home Loan Bank Board, or any person representing said Home Loan Bank Board, stated to anyone whomsoever that any Federal or other savings and loan association, or anyone whomsoever, contributing money toward a fund to oppose by litigation or otherwise the alleged seizure of the Federal Home Loan Bank of Los Angeles, would be subject to disciplinary or any action by said John H. Fahey as Federal Home Loan Bank Commissioner or otherwise, or said Home Loan Bank Board, or anyone else, or that any savings and loan association so contributing would be subject to seizure or any other interference whatsoever with its normal course of business, but said affiant is informed and believes and upon such information and belief states that at no time has said John H. Fahey as Federal Home Loan Bank Commissioner or otherwise or [14244] any officer, employee or representative of said John

H. Fahey as such Federal Home Loan Bank Commissioner or otherwise, or any member, officer or employee of said Home Loan Bank Board, or any person representing said Home Loan Bank Board, ever stated to anyone whomsoever that any action of any kind or character would be taken against any savings and loan association or any officer, employee or representative thereof by reason of the fact that such savings and loan association or its officers or its employees or representatives employed attorneys in the above-entitled litigation or any other litigation or contributed money for any of said purposes. Said affiant further states that said affiant is informed and believes and upon such information and belief states that neither said John H. Fahey as Federal Home Loan Bank Commissioner or otherwise or the members of said Home Loan Bank Board or anyone acting for and on behalf of either thereof, questioned or challenged the right of any savings and loan association whatsoever or its officers or employees or representatives to employ attorneys for the purpose of challenging or questioning any act of the Federal Home Loan Bank Administration by litigation or otherwise.

Affiant refers to his affidavit filed herein on or about the 25th day of February, 1950, in opposition to motions of First Federal Savings and Loan Association of Wilmington, et al., for attorneys' fees on account and costs, wherein said affiant states, at page 5 thereof, lines 15 to 24, as follows:

"That said Federal Home Loan Bank of San Francisco has mailed dividend checks to said

First Federal [14245] Savings and Loan Association of Bellflower commencing on July 9, 1946, to and including the 11th day of January, 1950, in a total sum of $2,057.00 and to said Long Beach Federal Savings and Loan Association in the total sum of $9,126.00. That said First Federal Savings and Loan Association of Bellflower and said Long Beach Federal Savings and Loan Association, and each one thereof, have retained said dividend checks but have not cashed the same as of the date hereof."

That said affiant in said statement inadvertently showed dividends paid to said Long Beach Federal Savings and Loan Association to and including the 11th day of January, 1950. Affiant wishes to correct said statement to read as follows:

"That said Federal Home Loan Bank of San Francisco has mailed dividend checks to said First Federal Savings and Loan Association of Bellflower commencing on July 9, 1946, to and including the 11th day of January, 1950, in a total sum of $2,057.00, and to said Long Beach Federal Savings and Loan Association commencing on July 9, 1946, to and including the 7th day of July, 1949, in a total sum of $9,126.00. That said First Federal Savings and Loan Association of Bellflower and said Long Beach Federal Savings and Loan Association, and each one thereof, have retained said dividend checks but have not cashed the same as of the date hereof."

Affiant further states that Federal Home Loan Bank of San Francisco declared a dividend payable on January 11, 1950, [14246] and that no dividend check was sent to Long Beach Federal Savings and Loan Association, but that said dividend of January 11, 1950, was applied in accordance with the letter of Federal Home Loan Bank of San Francisco to Long Beach Federal Savings and Loan Association dated December 30, 1949, a copy of which said letter is attached as Exhibit "A" to the Affidavit of T. A. Gregory, President of Long Beach Federal Savings and Loan Association, dated the 15th day of March, 1950, on file in the above-entitled consolidated actions.

Affiant further states that said Federal Home Loan Bank of San Francisco has paid dividends to its members who have not exchanged their stock in the former Federal Home Loan Bank of Los Angeles for stock of said Federal Home Loan Bank of San Francisco, but said dividends have been paid to such members as members of said Federal Home Loan Bank of San Francisco and not otherwise.

Further affiant saith not.

/s/ IRVING BOGARDUS.

Subscribed and sworn to before me this 17th day of March, 1950.

[Seal] /s/ CLARA H. COOPER,

Notary Public in and for the City and County of San Francisco, State of California. My commission expires January 10, 1953. [14247]

I Hereby Acknowledge Receipt of copy of the within Affidavit of Irving Bogardus this 20th day of March, 1950.

/s/ W. J. GILBERT, JR.,
For First Fed. of
Wilmington.

WESTOVER & SMITH,

By /s/ WYCKOFF WESTOVER,
For Plaintiffs in 5421 P. H.

O'MELVENY & MYERS,

/s/ BENNETT W. PRIEST,
For Plaintiffs in 5421 P. H.

[Endorsed]: Filed March 20, 1950. [14248]

Before the Department of Investment, Division of Corporations of the State of California

File No. 80282LA
Receipt No. LA 69192

I, the undersigned, as Commissioner of Corporations of said State, do hereby license Mrs. Flora E. Mallonee, Winnie Bucklin, and Mabel E. Fergus, Stockholders' Protective Committee for shares of Long Beach Federal Savings and Loan Association to engage in business as contemplated by Chapter 385, Statutes 1949, and the rules and regulations

of the Commissioner established pursuant thereto, and as such is duly authorized so to act

In the State of California

and generally to carry on said business in said State, under the terms and conditions set forth in said Act and rules and regulations, for and during the period ending the 31st day of December next after date of this certificate, unless the license shall have been sooner suspended or revoked.

In Witness Whereof, I have hereunto set my hand and affixed my official seal this first day of January, 1950.

[Seal] EDWIN M. DAUGHERTY,
Commssioner of Corporations.

By /s/ RONALD H. LOENHOLM,
Deputy Commissioner.

[Endorsed]: Filed March 27, 1950. [19096]

[Title of District Court and Cause.]

FIFTH SUPPLEMENTAL CROSS-CLAIM IN INTERPLEADER OF TITLE SERVICE COMPANY

Comes now the Defendant and Cross-Claimant, Title Service Company, leave of Court so to do having heretofore been had and obtained, and files this its Fifth Supplemental Cross-Claim in [19097] Interpleader against the Defendant Lillian A. Coggs-

well, sued herein as Jane Doe One, and all other Defendants and Cross-Defendants and in support thereof alleges:

I.

Cross-Claimant realleges and incorporates herein by reference its following prior pleadings;

(a) Its Original Answer and Cross-Claim in Interpleader, filed with this Honorable Court on June 4, 1946, and

(b) Its Supplemental Cross-Claim in Interpleader, filed with this Honorable Court on October 7, 1946, and

(c) Its Second Supplemental Cross-Claim in Interpleader, filed with this Honorable Court on January 22, 1947, and

(d) Its Third Supplemental Cross-Claim in Interpleader, filed with this Honorable Court on August 29, 1947, and

(e) Its Fourth Supplemental Cross-Claim in Interpleader, filed with this Honorable Court on October 28, 1947,

with the same force and effect as though said prior pleadings were again herein set forth in full.

II.

That the Defendant and Cross-Claimant filed with this Honorable Court on June 4th, 1946, its said First and Orignal Cross-Claim in Interpleader, depositing thereunder into the registry of this Court, 174 Trust Deeds with approximate face value of $800,000.00.

That thereafter, after filing with this Honorable Court on August 9th, 1946, Notice to File Supplemental Cross-Claim in Interpleader the said Defendant and Cross-Claimant did file on October 7, 1946, its said Supplemental Cross-Claim in Interpleader involving 25 notes and Deeds of Trust in the amount of $61,632.90. Thereafter, there issued from this Honorable Court the Minute Order of October 7, 1946, whereby it was ordered that motion of the Cross-Claimant, Title Service Company for permission to file Supplemental Cross-Claim in Interpleader, is granted and any further Cross-Claims may be filed without notice. [19098]

That thereafter on January 22, 1947, the Cross-Claimant, Title Service Company filed with this Honorable Court its Second Supplemental Cross-Claim in Interpleader involving 1 note and Trust Deed in the amount of $1,750.00.

That thereafter on August 29, 1947, the said Cross-Claimant filed with this Honorable Court its said Third Supplemental Cross-Claim in Interpleader involving 37 Promissory Notes and 36 Deeds of Trust in the amount of $101,931.54.

That thereafter on October 2, 1947, the said Cross-Claimant filed with this Honorable Court its Fourth Supplemental Cross-Claim in Interpleader involving 1 Note and Deed of Trust in the amount of $2,300.00.

That subsequent to said various interpleaders, the borrowers on many of said deeds of trust intervened as parties in this action and by process of this Honorable Court, obtained reconveyances legally effec-

tive to enable such borrowers to clear the titles to their property and homes from the liens and encumbrances of said deeds of trust.

III.

That by judgment of this Court, dated January 23, 1948, said Association was removed from the possession and control of cross-defendant, A. V. Ammann, and returned to the operation and management of its founding officers and directors.

That thereafter by appropriate mass interpleader proceedings, there was deposited into the registry of this Court, approximately $5,300,000.00 in face value, of United States Government Bonds. That there was at said time, the sum of approximately $1,500,000.00 in cash already on deposit in the Registry of the Court, which said bonds and cash, by appropriate orders of this Court, became substituted for, and in lieu of the obligations and securities, if any, of approximately $8,500,000.00 in face value of several thousands of notes and deeds of trust, owned by, and the property of, [19099] said Long Beach Federal Savings and Loan Association claimed by Cross-Defendants San Francisco Bank, et al., to be pledged by Defendant Ammann to said bank in connection with a claimed debt of approximately $6,300,000.00.

IV.

That the note and deed of trust hereinafter described, was not mentioned or described in said order of this Court, re said mass interpleader returning said approximately $8,500,000.00 of face

value of notes and deeds of trust to said Association. That there is doubt as to the effect of the omnibus clause of said Order of Court, upon the note and deed of trust hereinafter referred to, because apparently said note and deed of trust was either, (a) paid in full and discharged as of September 27, 1946, many months prior to the said Order of this Court returning said notes and deeds of trust, or (b) said note had been sold, assigned, and transferred by said Cross-Defendant Ammann to Cross-Defendant Lillian A. Coggswell, sometime in October, 1946, likewise many months prior in time to the said Order of this Court re mass interpleader on said $8,500,000.00 of face value of Association deeds of trust.

V.

That both said payment in full and discharge and/or said sale, assignment and transfer of said note and deed of trust, if either or both of said matters ever took place, occurred subsequent to, and after the commencement of this action on May 27, 1946, and likewise after the recordation of the notice of Lis Pendens in the office of the County Recorder in Los Angeles, California, wherein said real property is situated. That said Lis Pendens described and referred to said deed of trust and the real property therein purportedly conveyed and was recorded as aforesaid in June, 1946.

VI.

That on or about the 7th day of December, 1949, one Frank [19100] Makepeace, acting as attorney

for Lillian A. Coggswell, delivered to Cross-Claimant in Interpleader, Title Service Company, the following documents:

(1) A Note dated October 1, 1943, in the face amount of $1,200.00 bearing interest from October 1, 1943 at the rate of 6% per annum, principal and interest payable in monthly installments of $25.00 on the 1st day of each month, executed by Frank E. Russell, as maker and trustor and assumed by L. E. McCleary, in favor of the Long Beach Federal Savings and Loan Association, a Federal Corporation. Said note has an apparent unpaid balance of $631.78 as of April 4, 1946.

(2) A Deed of Trust securing the above-said note executed by one Frank E. Russell as trustor, to Title Service Company, Trustee, and Long Beach Federal Savings and Loan Association, a corporation, as beneficiary. That said deed of trust conveyed the legal title and ownership of the hereinafter described real property to the said trustee therein named, Title Service Company, Cross-Claimant herein, upon the terms and conditions contained in said deed of trust. The property so described is as follows:

> Lots 45 and 46 of Signal Park Tract, No. 2, in the City of Long Beach, County of Los Angeles, State of California, as per map recorded in Book 10, Page 109 of Maps, in the office of the County Recorder of said County.

Said property is situated in the County of Los Angeles, State of California. Said deed of trust

was recorded October 11, 1943, in Book 20322, Page 207 of Official Records, County of Los Angeles, California.

(3) That said note bears the perforation through the body thereof, "Paid" on two separate places, under one of which are also the figures 9-27-46, notwithstanding which there was also delivered to the said Cross-Claimant in Interpleader, Title Service Company, a purported assignment of said deed of trust. [19101]

That said instrument purported to be an assignment of the aforementioned and described deed of trust, and that said assignment was dated October 11, 1946, and purportedly executed by Cross-Defendant A. V. Ammann, as purported conservator of said Association.

That said instrument of Assignment was apparently acknowledged by said Ammann upon the date of its execution, October 11, 1946.

That the said Assignment was recorded on October 15, 1946, in Book 23641 at Page 121, of Official Records of the County Recorder of Los Angeles County, State of California, and was in favor of, and named as, assignee, said Cross-Defendant Lillian A. Coggswell.

VII.

That by the said Order of this Honorable Court, dated January 23, 1948, removing said Cross-Defendant Ammann as purported conservator of said Association, said Cross-Defendant Ammann was therein ordered to render to, and file with, said

Court, a "full and complete accounting," of all of the assets and liabilities of said Association and its transactions and dealings therein and therewith.

That said Association has informed this Cross-Claimant that said note and deed of trust, and the purported payment in full and discharge thereof and/or sale and assignment thereof, are neither reported in said purported accounting, nor described therein, nor otherwise identified or mentioned therein, except that, a loan number apparently referring to the said note and deed of trust is shown as an asset of said Association, at the time of the seizure thereof by cross-defendant Ammann, and is not carried as an asset of said Association at the time of the return of the various assets of said Association by the said Ammann to said Association. [19102]

VIII.

That the said Lillian A. Coggswell, by and through her attorney, claims to be the owner of, and the holder of, said note and deed of trust, and demands and insists that this Cross-Claimant, as trustee thereunder, must foreclose the same at her insistence and direction. That said Association, the named beneficiary under said trust deed and payee under said note, claims that the transactions of the said Ammann, with its assets and properties, are invalid, illegal and void, and the subject of accounting and other litigation now pending before this Court, and declines to acquiesce in, ratify or confirm the said purported assignment or sale of the

said note and deed of trust, by the said purported conservator Ammann, Cross-Defendant.

That this Cross-Claimant is unable to, at present, ascertain the attitude or position of said Ammann in connection with the particular transaction. That the said Defendant Ammann, in other and previous circumstances, similar but not identical, has asserted and claimed the power and right to sell, assign, transfer and deal with said Association's notes, deeds of trust and other assets.

XI.

That in June, 1946, when first named as a defendant in the above-entitled proceedings, and faced with the multiple, conflicting and contradictory claims and demands of various parties claimant to title and ownership, of notes and deeds of trust in which this Cross-Claimant was named as trustee, aggregating in face value approximately $12,000,000.00, this Cross-Claimant interplead each and all of said titles to the real property in said notes and deeds of trust, encumbered by, described in, and held by this Cross-Claimant as trustee, into the Registry and custody of this Honorable Court. That your Cross-Claimant as such trustee is unwilling to reconvey, foreclose or otherwise act as such trustee without [19103] the approval, direction and instruction of this Court by appropriate order and process of this Court.

X.

That your Cross-Claimant as such trustee is particularly hesitant even without this litigation and

said interpleader of titles, to act without instructions and direction from this Court in foreclosing a note and deed of trust marked "Paid" and perforated with such "Paid" marking, with the date of such purported payment. That there should be inquiry by this Court, by appropriate process into the true nature of the purported transactions whereby said Cross-Defendant Lillian A. Coggswell now claims to be the owner and holder of and entitled to foreclose the said note and deed of trust purportedly paid on September 27, 1946, and purportedly sold, assigned and transferred October 11, 1946, notwithstanding such purported payment by said Cross-Defendant Coggswell some 14 days prior thereto.

XI.

That said Lillian A. Coggswell, through her attorney, claims and represents that some of the installment payments due upon said note and deed of trust, are, or may be, barred by the statute of limitations, or otherwise outlawed by lapse of time, for the enforcement thereof. That this Cross-Claimant suggests that by appropriate process and orders of this Court, relief or action might be taken or indicated, permitting the enforcement of said deed of trust, without prejudice to the rights of the various parties including Plaintiffs, Shareholder Members Protective Committee; Defendants and Cross-Defendants, Long Beach Federal Savings and Loan Association; Home Indemnity Company, the bonding Company of said Ammann's bond; Defendants

and Cross-Defendants, Ammann, Lillian A. Coggswell, et al.

Wherefore, this Cross-Claimant, Title Service Company prays that the Court make its order against said Cross-Defendants and each [19104] and all of them, jointly and severally, as follows:

1. Allowing this Cross-Claimant to deposit with the Cerk of the Registry of this Court the following:

A. The hereinabove described promissory note and assumption agreement.

B. The hereinabove described trust deed.

C. The hereinabove assignment of trust deed.

D. The request for full Reconveyance by the defendant Long Beach Federal Savings and Loan Association by A. V. Ammann, Conservator.

2. That all conflicting claimants be required to interplead and litigate among themselves, and with this Cross-Claimant their various claims, ownership, and titles to the said note, deed of trust, assignment, and the real property therein described and conveyed.

3. That this Defendant and Cross-Claimant be instructed and directed by this Honorable Court as to its actions and duties as said trustee, under the circumstances disclosed by hearings of these matters before said Honorable Court and upon fulfillment of, and compliance with such orders and disclosures of said court be released and discharged from any

and all liabilities as such trustee to any and all of the parties herein upon the said above-described deed of trust, and

4. That the various conflicting claimants be enjoined and restrained from other litigation or harassment of this Cross-Claimant; and

5. That this Cross-Claimant herein recover its costs and expenses and a further reasonable sum for attorney's fees incurred, and said attorney's costs and expenses, and that said sum so allowed, be ordered paid by Defendants and Cross-Defendants, Fahey and Ammann, et al., or from the funds held in the Registry of this Court in interpleader; and [19105]

6. For such other and further order as may be meet and proper in the premises.

/s/ LYMAN B. SUTTER,
Attorney for Defendant
Title Service Company.

State of California,
County of Los Angeles—ss.

S. I. Bacon, being first duly sworn, deposes and says:

That he is the Vice-President of the Title Service Company, the Defendant who makes the foregoing Fifth Supplemental Cross-Claim in Interpleader of Title Service Company, and that he has read the same, and knows the contents thereof, and that the

same is true of his own knowledge, except as to matter therein stated upon information and belief, and as to such matters he believes them to be true.

/s/ S. I. BACON.

Subscribed and sworn to before me this 25th day of March, 1950.

[Seal] /s/ BERTHA E. CUMPTON,
Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed March 27, 1950. [19106]

[Title of District Court and Cause.]

MOTION FOR ORDER OF COURT REQUIRING DEFENDANTS AND CROSS-DEFENDANTS HOME LOAN BANK BOARD, ET AL., AND THEIR DEPUTIES, AGENTS, EMPLOYEES, ETC., TO APPEAR AND TESTIFY

Come Now,

1. The Plaintiffs, Mallonee, Bucklin and Fergus, the Shareholder Members Protective Committee of the Long Beach Federal Savings and Loan Association;

2. Long Beach Federal Savings and Loan Association, cross-claimants and third-party plaintiffs;

3. Title Service Company, a corporation, defendant and cross-claimant in interpleader;

4. Robert H. Wallis, defendant and cross-claimant in interpleader; and

5. George Turner, defendant and cross-claimant in interpleader;

and make this motion that this United States District Court make its Order or Orders, requiring and ordering the defendants, and cross-defendants, and third-party defendants:

(a) John H. Fahey, individually and as former Federal Home Loan Bank Commissioner, and in all other official capacities;

(b) A. V. Ammann, as former purported conservator of Long Beach Federal Savings and Loan Association, individually, as Assistant Chief Supervisor, and in all other official, representative, or other capacities;

(c) Home Loan Bank Board;

(d) Federal Savings and Loan Insurance Corporation;

(e) William K. Divers, Chairman of Home Loan Bank Board and trustee of Federal Savings and Loan Insurance Corporation, individually and in all other official, representative or other [19122] capacities;

(f) O. K. LaRoque, Member of Home Loan Bank Board and trustee of Federal Savings and Loan Insurance Corporation, individually and in all other official, representative, or other capacities;

(g) J. Alston Adams, Member of Home Loan Bank Board and trustee of Federal Savings and Loan Insurance Corporation, individually, and in

all other official, representative, or other capacities; and said above named defendants' servants, agents, deputies, employees, assistants, subordinates, and others subject to their direction and control.

(h) John M. Wyman, Chief Supervisor Home Loan Bank Board, and Federal Savings and Loan Insurance Corporation;

(i) R. J. Strecker, Assistant District Examiner, in charge of examination of Long Beach Federal Savings and Loan Association, and/or District Examiner for Third Federal Home Loan Bank District, and

(j) Irving Bogardus, defendant and cross-defendant, acting President of Federal Home Loan Bank of San Francisco; and all others who heretofore made and filed affidavits with this Honorable Court.

To Each and All Appear before this Court, at a time and place to be designated by this Honorable Court and to attend sessions thereof, and to then and there give evidence and testimony and be subject to direct and cross-examination; and to, at said time and place, bring with them, and each of them, and produce at the said time and place aforesaid, such documentary or written evidence, as this Honorable Court may direct.

Or in the Alternative

That this Honorable Court make other appropriate Orders ordering and directing, (1) the production of such testimony and evidence, at times and places, in manners and by methods, all [19123]

to be determined by said Court, and (2) inspection and production of the balance of the written or documentary evidence, a portion of which has been offered as exhibits attached to such affidavits.

That such orders provide for cross-examination of defendants and their subordinates so as to compel the disclosure of all of the documents and writings in their possession and the eliciting of all matters within their knowledge.

Said Motion will be based upon the following grounds:

1. That said defendants and cross-defendants, (a) to (j), have filed with this Honorable Court for consideration, and have urged that said Court make Orders and Judgments thereon, approximately 110 or more pages of affidavits, exhibits attached thereto, and other evidenciary matter, and

2. That such purported evidence, etc., is in the form of hearsay, opinion, legal conclusions, surmise, guess, and inference, each and all of which are not based upon facts, or actualities. That to demonstrate the falsity, or to verify the accuracy, thereof requires the test of cross-examination of such witnesses personally present in Court; and

3. That by the filing of such affidavits, containing the material therein presented to this Court, defendants Home Loan Bank Board, et al., tendered to the Court for decision, the issues raised by the pleadings and other filings, of many of the parties to this litigation. That the decision of such issues

thus tendered, requires a complete hearing on oral testimony and the introduction of contrary testimony, documents and other evidence, on the part of plaintiffs, cross-claimants and other parties to this action; and

4. That the said affidavits and exhibits therein contained, were filed with this Court, and served upon opposing parties, pursuant to a special Order of this Court, obtained Ex Parte on the 15th of March, 1950, extending the time for filing of supplementary and counter-affidavits, in response to affidavits previously filed [19124] by the parties moving for allowances of attorneys' fees for counsel for plaintiff Federal Home Loan Bank of Los Angeles, et al., and First Federal Savings and Loan Association of Wilmington. That the time of hearing of the motions for the said attorneys' fees, was prescribed in an Order of Court dated January 31st, 1950, setting the said motions for hearing on February 27th, 1950. That previous objections to said motions have been filed by said defendants Home Loan Bank Board, et al., on or about the 23rd day of September, 1949. That subsequent objection by said defendants to said motions for attorneys' fees was filed and served on or about February 23rd, 1949, by said defendants.

That during the course of the hearings on said motions for attorneys' fees on February 27th, and February 28th, 1950, the Court continued the further hearing thereof, until the 21st day of March, 1950, and set the 15th day of March, 1950,

as the date for the filing of all further affidavits for all parties.

That on the said 15th day of March, 1950, by Ex Parte application, defendant Federal Home Loan Bank of San Francisco, upon the affidavit of one of its counsel, Irving G. Bishop, obtained leave of Court for filing of counter-affidavits, on the 20th day of March, 1950.

That the defendants Home Loan Bank Board, approximately 40 hours before the date for further hearings of said motions for attorneys' fees, during the course of a hearing before the Special Master of this Court, served upon opposing counsel, approximately 110 pages of affidavits and exhibits.

That of the Said 110 Pages, Approximately 11 Pages of Affidavits Are Dated Subsequent to the Said 15th Day of March, 1950, and Approximately 87 Pages of Affidavits and Exhibits Are Dated, at the Latest, 11 Months Prior to Said Date, and Some of Said Exhibits Are Dated as Early as 1936. That 51 Pages of Such Affidavits Are Dated in April of 1949, 11 Months Prior to the Date [19125] of Filing Thereof.

That said material could have been filed and served by said defendants and cross-defendants within the Court's previous requirements as to filing of objections and counter-affidavits; and

5. That most of the allegations set forth in said affidavits and exhibits are extraneous to the issues of allowances of attorneys' fees to the moving parties Federal Home Loan Bank of Los Angeles, et al.,

and First Federal Savings and Loan Association of Wilmington, et al., but if in evidenciary form, and if truthful, would, or might in part, be pertinent to the decision of issues concerning the Long Beach Association, its seizure and attempted confiscation, and its prior restoration by defendants Home Loan Bank Board, and Order and Judgment of this Court; and

6. That the exhibits attached to said affidavits constitute but a small portion of the volume of such documentary evidence from which such exhibits were extracted. That the balance thereof, or all, or part of, said balance, contain evidence contradictory to, and conflicting with, the matters contained in said exhibits to said affidavits. That such other documentary evidence is being withheld and suppressed by said defendants, and inspection or examination thereof refused and prevented; and

7. That the testimony attempted to be given by affidavit is within the power and control of said defendants Home Loan Bank Board, et al., to produce by personal attendance of said affiants as witnesses, before this Honorable Court, and the filing of originals, photostats, or authenticated copies, of such exhibits, instead of the extracts thereof attached to said affidavits.

8. That the said affidavits are either those of individual defendants and cross-defendants themselves, or of their deputies, subordinates, employees, and agents. That Each and All of Said Individual

Defendants and Their Said Subordinates, Agents and Deputies, With the Exception of Defendant Fahey, Have Been and [19126] Will Be on Many Occasions, Within the District of This United States District Court, and Within the Boundaries of the State of California.

That the affiant Wyman has been in the County of Los Angeles, State of California, on several occasions, within the year 1949.

That the affiant Strecker was in the premises of the Long Beach Federal Savings and Loan Association (in Los Angeles County) for extended periods of many months.

That the defendant Ammann, for twenty months, was within the County of Los Angeles, State of California, in possession of the said Long Beach Federal Savings and Loan Association, after his seizure thereof.

That each and all of said affiants, (with the exception of defendant Fahey) are salaried officers or employees of the various defendants, and have their traveling and living expenses paid from the budgets and resources of said other defendants.

That the said Federal Savings and Loan Insurance Corporation is a multi-million dollar corporation, with ample assets, income, and budget, to finance the personal production of all necessary witnesses before this Honorable Court, to give the testimony sought to be presented to this Court by such affidavits; and

9. That this motion is based upon all of the pleadings, records, papers, files and documents, in

the above-entitled actions, and upon the Notice of Motion, Affidavits, and Memorandums of Points and Authorities filed herewith.

Wherefore, moving parties pray that this Honorable Court make its Order or Orders, as follows:

1. Requiring and ordering the defendants and cross-defendants, and third-party [19127] defendants:

(a) John H. Fahey, individually and as former Federal Home Loan Bank Commissioner, and in all other official capacities;

(b) A. V. Ammann, as former purported conservator of Long Beach Federal Savings and Loan Association, individually and as Assistant Chief Supervisor, and in all other official, representative, or other capacities;

(c) Home Loan Bank Board;

(d) Federal Savings and Loan Insurance Corporation;

(e) William K. Divers, Chairman of Home Loan Bank Board and trustee of Federal Savings and Loan Insurance Corporation, individually and in all other official, representative or other capacities;

(f) O. K. LaRoque, Member of Home Loan Bank Board and trustee of Federal Savings and Loan Insurance Corporation, individually and in all other official, representative, or other capacities;

(g) J. Alson Adams, Member of Home Loan Bank Board, and trustee of Federal Savings and Loan Insurance Corporation, individually, and in

all other official, representative, or other capacities; and said above named defendants' servants, agents, deputies, employees, assistants, subordinates, and others subject to their direction and control.

(h) John M. Wyman, Chief Supervisor, Home Loan Bank Board, and Federal Savings and Loan Insurance Corporation;

(i) R. J. Strecker, Assistant District Examiner, in charge of examination of Long Beach Federal Savings and Loan Association, and/or District Examiner for Third Federal Home Loan Bank District; and

(j) Irving Bogardus, defendant and cross-defendant, acting President of the Federal Home Loan Bank of San Francisco; and all others who heretofore have made and filed affidavits [19128] with this Honorable Court,

To Themselves Appear, and/or to cause their said servants, agents, deputies, employees, assistants, subordinates, and others subject to their direction and control to appear, at a time and place to be designated by this Honorable Court before this Court, and to attend sessions thereof, and to then and there give evidence and testimony, and be subject to direct and cross-examination; and to, at said time and place, bring with them, and each of them, and produce at the said time and place aforesaid, such documentary or written evidence, as this Honorable Court may direct.

Or in the Alternative

(2) That this Honorable Court make other ap-

propriate Orders or Judgments, authorizing and directing the production of such testimony and evidence, at times and places, and in manners and by methods to be fixed by this Court, to enable appropriate and proper cross-examination of defendants and their subordinates, whose evidence has been offered by affidavit, and inspection and production of the balance and remainder of the written or documentary evidence, a portion of which has been offered as exhibits attached to such affidavits; and

(3) For such other and further relief as the Court deems meet and proper in the premises.

Dated this 27th day of March, 1950.

WESTOVER & SMITH,

By /s/ WYCKOFF WESTOVER,

Attorneys for Plaintiffs, Mallonee, Bucklin, and Fergus, of the Shareholder Members Protective Committee of the Long Beach Federal Savings and Loan Association.

CHARLES K. CHAPMAN,

/s/ CHARLES K. CHAPMAN,

Attorney for Third-Party Plaintiff and Cross-Claimant, Long Beach Federal Savings and Loan Association.

LYMAN B. SUTTER,

/s/ LYMAN B. SUTTER,

Attorney for Defendant and Cross-Claimant in Interpleader, Title Service Company.

RAYMOND TREMAINE,

/s/ RAYMOND TREMAINE,
Attorney for Defendant and Cross-Claimant in Interpleader, Robert H. Wallis.

F. HENRY NeCASEK,

/s/ F. HENRY NeCASEK,
Attorney for Defendant and Cross-Claimant in Interpleader, George Turner. [19130]

[Title of District Court and Cause.]

AFFIDAVIT OF CHARLES K. CHAPMAN

State of California,
County of Los Angeles—ss.

Charles K. Chapman, being first duly sworn, deposes and says:

That affiant is attorney for third-party plaintiff and cross-claimant Long Beach Federal Savings and Loan Association and has been such since shortly after the inception of this [19134] litigation in 1946. That among the approximately 100 pages of affidavits and exhibits filed March 20, 1950, by defendants Home Loan Bank Board, et al., are a 30 page affidavit by R. J. Strecker dated April 22, 1949; a 12 page affidavit of John M. Wyman dated April 19th, 1949; and various other exhibits and affidavits relating in whole, or in part, to alleged matters concerning the books, accounts, and records, of Long Beach Federal Savings and Loan Association, and that said defendants and cross-defendants

chose to impose upon the court and opposing counsel, and to file such 11 month old affidavits and many years old exhibits, upon the eve of the hearing. That such late filing by said defendants Home Loan Bank Board, et al., was an attempt to prevent the moving parties herein from producing appropriate contrary testimony and evidence;

That the matters stated in such affidavits are legal conclusions, hearsay, surmise and guess, and can be properly tested and disproved only by the cross-examination of the said affiants personally present in Court, before this Honorable Court, in Los Angeles County, California, by the use in such cross-examination of the said books, records, and accounts to which they refer in their said affidavits.

That the confronting of said affiants with the records from which they claim to draw the conclusions which they state under oath, will enable this Court to judge for itself from the said records and from the personal testimony of the said affiants, the truth or falsity of the conclusions, guesses and hearsay contained in said affidavits, and will in addition thereto, enable this Honorable Court to determine the truth or falsity of the grave charges involving dishonesty, (and if true, criminal liability) made in such affidavits against reputable citizens of Los Angeles County, California, whose only offense has been that of being a customer of the Long Beach Federal Savings and Loan [19135] Association, and thereby incurring the spite and hatred of those who seized and attempted to destroy said Association.

That counsel for such citizens of Los Angeles County, California, thus falsely accused of wrongdoing, should be enabled to cross-examine the Home Loan Bank Board's employees, who thus make such accusations that said affidavits are alleged to be based upon the books and records necessary to the daily conduct of the business of said Association, and which books, etc., can be conveniently produced before this Honorable Court within the same County and only a few miles distant from the business and premises of said Association.

That it is difficult if not impossible, to attempt to summarize such books and records in counter-affidavits, without the opportunity of cross-examination of the said Home Loan Bank Board subordinates and employees.

That all of the matters set forth in said affidavits concerning the seizure of said Long Beach Association and the purported reasons and grounds therefor, were known to the affiants making such affidavits, and to their superiors, defendants Home Loan Bank Board, et al., on or prior to January 17th, 1948, at the time of the adoption of Home Loan Bank Board Order No. 388, rescinding the appointment of defendant Ammann as conservator, and returning said Association to the officers and directors from whom it had been seized by the said Ammann, and who are the same officers and directors accused of the four to sixteen year old matters set forth in said affidavits.

That cross-examination of said defendants will

enable this Court to test the falsity or truthfulness of the matters contained in their said affidavits.

Wherefore, Affiant respectfully requests that this Honorable Court require said defendants and cross-defendants and their employees and subordinate affiants, to appear personally [19136] before this Court and to give, in the presence of the Court, and subject to cross-examination, the testimony they have sought to present by such affidavits.

/s/ CHARLES K. CHAPMAN.

Subscribed and sworn to before me this 27th day of March, 1950.

[Seal] /s/ MARGARET O. SHALLIS,
Notary Public in and for
Said County and State.

[Title of District Court and Cause.]

AFFIDAVIT OF WYCKOFF WESTOVER IN RESPONSE TO THE DOCUMENTS FILED MARCH 20, 1950, BY HOME LOAN BANK BOARD, et al., AND FEDERAL HOME LOAN BANK OF SAN FRANCISCO, et al.

State of California,
County of Los Angeles—ss.

Wyckoff Westover, being first duly sworn, deposes and says:

That he is a member of the firm of Westover & Smith, Counsel representing the plaintiffs, Mallonee, et al., the Shareholder Members Protective

Committee of the Long Beach Federal Savings and Loan Association.

That by order dated March 15, 1950, parties in the above-entitled [19138] matter were allowed until and including "March 20, 1950, within which to prepare, serve and file any counter affidavits in response to the affidavits of Tracy Skelton and J. Howard Edgerton, heretofore filed in the above-entitled matter * * *"

That on Monday afternoon, March 20, 1950, there was served upon affiant the following:

1. Response to the affidavit of J. Howard Edgerton and Tracy Skelton on behalf of the Home Loan Bank Board, William K. Divers, J. Alston Adams and O. K. LaRoque, members of the Home Loan Bank Board, and the Federal Savings and Loan Insurance Corporation, and attached thereto:

(a) Affidavit of John H. Fahey dated March 18, 1950, consisting of 5 pages, with exhibits 1 to 7, consisting of approximately 36 pages.

(b) Affidavit of John M. Wyman, dated March 17, 1950.

(c) Affidavit of William K. Divers, dated March 18, 1950.

(d) Affidavit of John H. Fahey, dated April 19, 1949, consisting of 8 pages.

(e) Affidavit of R. J. Strecker, dated April 22, 1949, consisting of 31 pages.

2. Affidavit of Irving Bogardus, filed on behalf of the Federal Home Loan Bank of San Francisco, dated March 17, 1950, consisting of 7 pages.

3. Affidavit of John M. Wyman, dated April 9, 1949, consisting of 12 pages.

That affiant has read said affidavits and responses and that said affidavits in the main are not responsive to the affidavits of J. Howard Edgerton and Tracy Skelton; that a large portion of said affidavits and responses are not within the [19139] purview of said courts order issued March 15, 1950, allowing the filing of "counter affidavits" up to and including March 20, 1950; that most of the allegations and statements in said affidavits are not material to the present pending motions of:

A. Federal Home Loan Bank of Los Angeles for:

(a) Order directing payment of attorneys' fees on account.

(b) Order directing repayment of cost moneys advanced.

B. First Federal Savings and Loan Association of Wilmington, for allowance on account of attorneys' fees in Class action.

That the affidavit of John H. Fahey, dated March 18, 1950, setting forth his alleged reasons for merging the Federal Home Loan Bank of Los Angeles into the uneconomically operated Federal Home Loan Bank of Portland which then had only one outstanding loan. And the reporting of hearsay versions of alleged conversations with various persons, government officials, and others, are not material to the present pending motions regarding attorneys' fees and costs;

That neither in the said affidavit of John H.

Fahey, dated March 18, 1950, nor in the documents attached thereto, is there any statements that said documents constitute all of the files, records, reports, correspondence and documents dealing with the subject matters and transactions, correspondence and conversations referred to in said affidavit of John H. Fahey, of March 18, 1950, and the documents attached thereto.

That the year old affidavit of John H. Fahey, dated April 19, 1949, is not a proper counter affidavit to the affidavits of Tracy Skelton and J. Howard Edgerton, dated and filed approximately 11 months later.

That said affidavit of John H. Fahey of April 19, 1949, reviewing the history of the growth of the Federal Home Loan Bank system, is not responsive to said affidavit of Tracy Skelton and J. Howard Edgerton, nor is it material to the pending motions for [19140] interim on account allowance of attorneys' fees and reimbursement of expenses.

That the year old affidavit of R. J. Strecker, dated April 22, 1949, allegedly "based on his examination of the Long Beach Federal Savings and Loan Association as of May 18, 1946, and of the records of said Association" and therein reviewing:

His qualifications,
Officers and directors,
Annual organizational meeting of directors,
Joint occupancy,
Loans secured by first deeds of trust,

Concentration,
J. D. Wilhoit loans,
J. D. Wilhoit and E. M. Frame,
J. D. Wilhoit as an individual,
C. S. Jones,
C. J. Jones,
Jones Brothers Lumber Co.,
Identity of borrowers,
C. S. Jones loans July 16, 1940, etc.,
C. J. Jones loans—1941,
Jackson Turner loans,
Loans to Jackson Turner as borrower,
Loans to various individuals on properties where Jackson Turner was the contractor,
Other loans granted by Association,
Moss and Co., 1939,
Paul Cawood, 1937,
Mason E. Knight, 1938,
Jack and Carolyn Stanaland,
Ducrete Co., 1941,
Sales of loans to individuals—March, [19141] 1940, etc.,
Real estate sales—1938, etc.,
Inadequately explained and/or questioned expenses in general,
Disbursements to gasoline service stations, 1943, etc.,
Disbursements involving Lorne D. Middough, 1943, etc.,
Legal Fees—1938-May, 1946,
Other inadequately explained or questioned expenses,

Billboard advertising,
Travel and legal expenses incurred by T. A. Gregory—1945-March, 1946,
Resolution Board of Directors, dated May 8, 1946,
Attendance,
Leasing of Rolston Hotel,
Lease of two alley stores to J. D. Wilhoit,
$100,000.00 resolution,
Issuance of 21,000 shares accounts,
Appointment of conservator, May 20, 1946,

is not material to the pending motions of the Federal Home Loan Bank of Los Angeles and the First Federal Savings and Loan Association of Wilmington, for interim allowance on account of attorneys' fees and repayment of expenses.

That the year old affidavit of John M. Wyman, dated April 19, 1949, dealing with the examination of the Long Beach Federal Savings and Loan Association in July, 1945, and other matters regarding the Long Beach Federal Savings and Loan Association, allegedly reported by affiant Wyman on or about March 1, 1946, including matters from 1934 to 1946, none of which dealt with the Federal Home Loan Bank of Los Angeles, or the First Federal Savings and Loan Association of Wilmington, are not material to the pending motions of the Federal Home Loan Bank of Los Angeles and the First Federal Savings and Loan Association of Wilmington for an interim allowance on account of attorneys' fees and reimbursements [19142] for costs advanced.

That the said affidavits, including the affidavit of Irving Bogardus dated March 17, 1950, do contain a great many allegations and statements, conclusions and opinions, which are material to and have bearing upon the main issues in the principal litigation in chief; that your affiant is informed and believes and on such information and belief alleges that some of the statements and allegations in said affidavits are incorrect and that most of the material allegations and statements in said affidavits are contrary to and in conflict with allegations and statements in other affidavits and verified pleadings heretofore filed in this litigation;

That your affiant respectfully requests that all affidavits and verified pleadings heretofore filed in this litigation by or on behalf of the plaintiffs Shareholder Members Protective Committee of the Long Beach Federal Savings and Loan Association and/or by the Long Beach Federal Savings and Loan Association, and/or by the Title Service Company, and/or by Robert H. Wallis, be hereby referred to, and deemed submitted in connection with the pending motions of the said Federal Home Loan Bank of Los Angeles, and the said First Federal Savings and Loan Association of Wilmington for interim allowance on account of attorneys' fees, and for reimbursement of costs, and be deemed and considered as denials of and in response to all of the material allegations, statements, conclusions and opinions set forth or referred to in the above-listed affidavits.

That in order to properly and adequately respond

to the numerous allegations, statements, opinions and conclusions set forth at length and in detail in the above listed affidavits and the documents attached thereto, it will be necessary that these plaintiffs be afforded opportunity to inspect all of the books, records and documents, any part of which is referred to in said [19143] affidavits or the documents attached thereto, and to cross-examine the makers of said affidavits of the defendants, and their agents, employees or servants, to wit:

Defendant William K. Divers, Chairman of the Home Loan Bank Board,
John M. Wyman, Chief Supervisor,
Defendant A. V. Ammann,
R. J. Strecker, District Examiner,
Defendant John H. Fahey,
Defendant Irving Bogardus.

Wherefore, it is respectfully requested that this court make its order that the said defendants and their agents, servants and employees, and each of them, appear before this Honorable Court and bring with them all of the books, records, documents, files and complete correspondence to which reference is made in any of said affidavits or in any of the documents attached to said above listed affidavits;

That said Order further provide that parties to this litigation be afforded opportunity to examine such books, records, documents and correspondence and to cross-examine the makers of said affidavits and their agents, servants, and employees.

That this Honorable Court fix the time for such

inspection, and the cross-examination of such parties and their agents, employees and servants.

Dated at Los Angeles this 27th day of March, 1950.

WESTOVER & SMITH,
By /s/ WYCKOFF WESTOVER,
Attorney for Plaintiffs, Shareholder Members Protective Committee of the Long Beach Federal Savings and Loan Association.

Subscribed and sworn to before me this 27th day of March, 1950.

[Seal] /s/ FAY V. DEALEY,
Notary Public in and for
Said County and State.

[Endorsed]: Filed March 27, 1950. [19144]

At a stated term, to wit: The February Term, A.D. 1950, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, on Monday, the 27th day of March, in the year of our Lord one thousand nine hundred and fifty.

Present: The Honorable Peirson M. Hall,
District Judge.

[Title of Cause.]

For hearing on motion that Flora E. Mallonee,

Mabel E. Fergus, and Winnie Bucklin, the presently constituted Shareholders' Protective Committee of Long Beach Savings & Loan Assoc., be made parties plaintiff,—Paul L. Mallonee and C. H. Newhouse being deceased; Wyckoff Westover, Esq., appearing as counsel for plaintiffs and Shareholders' Protective Committee; Chas. K. Chapman, Esq., appearing as counsel for defendant Long Beach Federal Savings & Loan Assoc.; Irving Bishop, Esq., appearing as counsel for defendants Federal Home Loan Bank of San Francisco; Paul Fitting, Asst. U. S. Atty., and Wm. F. McKenna, Esq., of general counsel, appearing as counsel for Federal Home Loan Bank Board, John H. Fahey, and A. V. Ammann;

Copy of license of Shareholders' Protective Committee of Long Beach Savings & Loan Assoc. to do business is filed.

Supplemental points and authorities in support of motion for substitution of parties is filed.

Objection to motion for substitution of parties plaintiff is overruled and said motion is granted, Attorney Westover to prepare written order. [19145]

[Title of District Court and Cause.]

AFFIDAVIT OF RICHARD FITZPATRICK COUNTERING AFFIDAVIT OF A. V. AMMANN IN OPPOSITION TO MOTION AND PETITION OF PLAINTIFF, FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF WILMINGTON, FOR ALLOWANCE OF ATTORNEYS' FEES AND COSTS IN CLASS ACTION

State of California,
County of Los Angeles—ss.

Richard Fitzpatrick, being first duly sworn, deposes and says:

1. He is one of the attorneys for the Federal Home Loan Bank of Los Angeles, plaintiff in Civil Action No. 5678-P.H., and [19146] one of the attorneys for five of the six association plaintiffs in said action, the sixth association plaintiff in said action being represented by W. I. Gilbert, Esq.

2. He has read the affidavit of A. V. Ammann in opposition to motion and petition of plaintiff, First Federal Savings and Loan Association of Wilmington, for allowance of attorneys' fees and costs in class action, dated March 9, 1950, and filed herein.

3. It is not true, as stated in said affidavit of A. V. Ammann on page 2, lines 14 to 22, that said Ammann's assignment to the Federal Home Loan Bank of Los Angeles in March, 1946, "had no ref-

erence to any proposal with respect to consolidating the Federal Home Loan Bank of Los Angeles," but was "for the purpose of assisting the employee of the Federal Home Loan Bank Administration who was then assigned to the duty of supervising all associations in the Twelfth Federal Home Loan Bank District."

4. It is not true, as stated in said affidavit of A. V. Ammann on page 3, lines 14 to 16, that the purpose of said "spot checks" referred to therein was to ascertain "the extent to which said associations may have been induced by either Richard FitzPatrick or Charles Berry to employ said Richard FitzPatrick."

5. It is not true, as stated in said affidavit of A. V. Ammann on page 3, lines 27 to 32, and on page 4, lines 1 to 7, that said "spot checks" were not made "with a view toward taking any supervisory action on account of any appropriations that might have been made for the purpose of contesting the consolidation of the Los Angeles Bank; that, on the contrary said special limited examination was made solely for the purpose of determining whether there had been violations of regulations of the Federal Home Loan Bank Board which prohibited attorneys employed by the Federal Home Loan Bank from acting as attorneys for member associations without the consent of the Board, and for the purpose of determining whether the said Charles Berry had engaged in any [19147] improper conduct as an officer of the Los Angeles Bank."

6. It is not true, as stated in said affidavit of A. V. Ammann on page 2, lines 29 to 32, and on page 3, lines 1 to 6, "that it appeared from said memorandum that said Richard FitzPatrick while an employee of that Bank [Federal Home Loan Bank of Los Angeles] had solicited or was soliciting some twenty-five or more savings and loan associations named in said memorandum (which associations were members of said Bank) to induce them to engage his services as attorney; that said memorandum further indicated that Charles Berry, then an officer of said Bank and then engaged in supervising the said associations on behalf of the Federal Home Loan Bank Board was also then soliciting said associations, or some of them, to engage the services of said Richard FitzPatrick."

7. In amplification and explanation of the foregoing denials, affiant states:

With regard to the foregoing denial that the purpose of Ammann's assignment to the Federal Home Loan Bank of Los Angeles in March, 1946, had no reference to any proposal with respect to consolidating the Federal Home Loan Bank of Los Angeles but was for the purpose of assisting the employee of the Federal Home Loan Bank Administration who was then assigned to the duty of supervising all associations in the Twelfth Federal Home Loan Bank District, affiant states that on March 13, 1946, defendant John H. Fahey, as Federal Home Loan Bank Commissioner, wrote to Honorable John W. Snyder, Director, War Mobili-

zation and Reconversion, The White House, Washington, D. C., requesting his clearance of said Fahey's proposed action to consolidate the Federal Home Loan Bank of Los Angeles with the Federal Home Loan Bank of Portland and requesting said Snyder's approval of said Fahey's order of consolidation, a copy of which was attached to the said letter. A copy of said letter is attached as [19148] Exhibit C to the affidavit of Ernest E. Reardon dated September 20, 1949, which affidavit is in turn attached to the memorandum of the so-called "official defendants" in opposition to motions for orders directing payment of attorneys' fees on account and repayment of moneys advanced and the supplements thereto, which said memorandum was filed herein.

Affiant quotes the last paragraph of said letter of said defendant John H. Fahey, as Federal Home Loan Bank Commissioner, as follows:

> "As I have explained when some weeks ago I discussed briefly with the President the advisability of consolidating some of these Banks, he suggested that I check with you. I would, therefore, appreciate your clearance of my proposed action and approval of the attached order which I propose to have promulgated. As a temporary budget of the Los Angeles Bank expires March 31, 1946, and as it is our intention to effect the consolidation before that time the matter is of considerable urgency."

Affiant also refers to a memorandum dated March 19, 1946, marked "Confidential" and bear-

ing the initials "J.H.F.," which memorandum is attached as Exhibit E to the affidavit of Ernest E. Reardon above mentioned, from which affiant quotes a part thereof as follows:

> "At about 3:15 I was informed that Mr. Snyder had called and wished me to call back. I called him promptly when he said immediately that there was no occasion for any delay in the matter and I could 'go straight ahead' with the plan I discussed with him."

On March 22, 1946, defendant John H. Fahey, as Federal Home Loan Bank Commissioner, designated and appointed A. V. Ammann an Assistant Secretary to the Federal Home Loan Bank Administration by Order No. 5057 of said Federal Home Loan Bank Administration. A copy of said order was published in the Federal Register, Volume 11, No. 169, Page 9479, on August 29, 1946. Affiant quotes part of said order as follows: [19149]

"[Order 5057]

"Appointment of Assistant Secretary of Federal Home Loan Bank Administration to Exercise Authority of Secretary of Said Administration

March 22, 1946

> "Effective immediately Albert V. Ammann is hereby designated and appointed Assistant Secretary to the Federal Home Loan Bank Administration. The said Albert V. Ammann shall serve as such without any compensation additional to that received as Assistant Chief

Supervisor. * * * The said Albert V. Ammann may at his option sign any instrument or writing as A. V. Ammann."

A. V. Ammann appeared at the offices of the Los Angeles Bank about a week or so prior to March 29, 1946, and thereafter, to and including the 29th day of March, 1946, and thereafter spent a part of the time during the business hours of said Bank in its offices.

On the morning of March 29, 1946, and prior to the seizure of the Federal Home Loan Bank of Los Angeles at about 12:00 o'clock noon of said day, said A. V. Ammann, by appending his signature to a form of certification thereon, certified as Assistant Secretary of the Federal Home Loan Bank Administration, that the copies of Orders No. 5082, 5083 and 5084 (which were served upon Charles E. Berry, as Vice-President of said Federal Home Loan Bank of Los Angeles at the time possession of said Bank was seized) were orders issued by the Federal Home Loan Bank Administration on March 29, 1946. Said certification was made by said A. V. Ammann upon receipt by him of telephonic advice from the Federal Home Loan Bank Administration in Washington, D. C., that said orders had been issued on that day. Said A. V. Ammann was in the offices of the Federal Home Loan Bank of Los Angeles at the time of its seizure by officials and employees of the Federal Home Loan Bank Administration and took part in such seizure.

It is, therefore, affiant's information and belief and he, therefore, states the fact to be, that said

Ammann was sent [19150] by the defendant John H. Fahey, as Federal Home Loan Bank Commissioner, to the Federal Home Loan Bank of Los Angeles about a week or so prior to March 29, 1946, for the purpose of being on hand at the time of the proposed seizure of said Bank so as to certify, as an Assistant Secretary of said Federal Home Loan Bank Administration, to the said Orders No. 5082, 5083, and 5084, and for the purpose of taking part with other employees and officials of the Federal Home Loan Bank Administration in the seizure of said Bank; that he was not sent to the Los Angeles Bank for the purpose of assisting the employee of the Federal Home Loan Bank Administration who was then assigned to the duty of supervising associations in the Twelfth Federal Home Loan Bank District, as averred in said affidavit of said Ammann.

8. With regard to the foregoing denial that the purpose of the "spot checks," referred to in said affidavit of A. V. Ammann, was to ascertain "the extent to which said associations may have been induced by either Richard FitzPatrick or Charles Berry to employ said Richard FitzPatrick," and with regard to the foregoing denial that said "spot checks" were not made with a view toward taking supervisory action on account of any appropriations that might have been made for the purpose of contesting the consolidation of the Los Angeles Bank, and with regard to the foregoing denial that the said "spot checks" were made solely for the purpose of determining whether there had been any

violations of the regulations of the Federal Home Loan Bank Board which prohibited attorneys employed by the Federal Home Loan Bank from acting as attorneys for member associations without the consent of the Board and for the purpose of determining whether the said Charles E. Berry had engaged in any improper conduct as an officer of the Los Angeles Bank, affiant states:

He had resigned as counsel for the Federal Home Loan Bank of Los Angeles on July 30, 1940, nearly six years prior to [19151] the making said "spot checks."

A copy of affiant's letter of resignation as counsel for the Federal Home Loan Bank is as follows:

"July 30, 1940

"The Honorable Board of Directors,
"Federal Home Loan Bank of Los Angeles,
"311 South Spring Street,
"Los Angeles, California.

"Gentlemen:

"I regret that personal interests force me to resign as general counsel for the Bank, effective September 1, 1940.

"The nearly eight years of my connection with the Bank have been exceedingly pleasant and in many respects full of satisfaction. I have enjoyed taking part in the pioneering of the Bank System, the Federal Savings and Loan System and the Insurance Corporation, and in working with the leaders of the savings and loan industry, who have constituted the membership of the Board of Directors.

"I hope those friendships I have made among members of the Board and among the officers will remain with me throughout my life.

"May I offer to each member of the Board, each officer and each member of the staff, my very best wishes.

"Sincerely,

"RICHARD FITZ PATRICK."

On July 31, 1940, affiant wrote to James Twohy, then Governor of the Federal Home Loan Bank System, advising him of his resignation as counsel for the Federal Home Loan Bank of Los Angeles. A copy of affiant's said letter is as follows:

"July 31, 1940

"Mr. James Twohy, Governor,
"Federal Home Loan Bank System,
"Federal Home Loan Bank Board,
"Washington, D. C.

"Dear Mr. Twohy:

"I am today delivering to Mr. Hurford [President of the Federal Home Loan Bank of Los Angeles] the original of the enclosed letter resigning my position as counsel for the Federal Home Loan Bank of Los Angeles.

"It is somewhat of a wrench to leave the institution which, for nearly eight pleasant and interesting years, I [19152] have looked upon as partly my baby. However, I felt that I could not longer serve the Bank at the expense of my own interests. My inability, under the Regulations, to represent

members of the Bank or to accept retainers from them makes it necessary for me to take this step.

"Although I shall no longer be connected with the Bank and the Board, my interest in them and in the men connected with them will always remain. I trust that our friendship, and that of the other men in Washington whom I have come to know, will continue throughout the years.

"When you are in Los Angeles I hope that I shall continue to have the opportunity of seeing you.

"Kindest regards and best wishes!

"Sincerely yours,

"RICHARD FITZ PATRICK."

"Airmail

"RF:MC"

Thereafter, affiant received from said James Twohy a reply to said letter. A copy of said reply is as follows:

"Federal Home Loan Bank Board

"Washington

"August 2, 1940

"Office of the Governor,

"Federal Home Loan Bank System.

"Mr. Richard FitzPatrick,

"Williamson, Hoge & Judson,

"433 South Spring Street,

"Los Angeles, California.

"Dear Mr. FitzPatrick:

"Your letter of July 31 has just come in, and the news of your resignation is as much regretted by

me as the wrench of leaving the institution is to you.

"When the official announcement comes along on the belt-line in due course, the matter will be processed in formal fashion. Meantime, I hasten to dispatch this personal note that you may know that I genuinely share your own feelings regarding the separation. I can well understand the reasons you recount for making this reluctant move, and certainly wish you most cordially all the success that your rich experience and fine talents will bring you.

"Sincerely yours,

"(Initialed) J T
"James Twohy,
"Governor." [19153]

On August 16, 1940, at a regular meeting of the Board of Directors of said Los Angeles Bank, held on said date, the following resolution accepting the resignation of affiant as counsel for said Bank was adopted:

"Whereas, Richard FitzPatrick has served this Bank as its general counsel since the organization of the Bank in October, 1932, and has rendered, during that time, professional services of inestimable value to this Bank and to its members, and has, by his diligence, his cooperation, and his professional excellence, contributed in great measure to the advancement not only of this Bank but of the Federal Home Loan Bank System, and

"Whereas, in addition to maintaining high professional standards, Mr. FitzPatrick has, as an individual, displayed fine human qualities which

have endeared him to the members of this board and to the members of the staff of this Bank, and

"Whereas, Mr. FitzPatrick now finds it necessary, for the protection of his personal interests and his private law practice, to resign his position as general counsel of this Bank, effective September 1, 1940;

"Now Therefore, Be It Resolved: That this board accepts, with regret, the resignation of Richard FitzPatrick, General Counsel, and expresses to him its appreciation for the services which he has rendered to the Bank."

Said special limited examination of the legal expense accounts of associations (the so-called "spot checks") could not show whether or not affiant or Charles E. Berry had induced said associations to employ affiant, or affiant or said Charles E. Berry had solicited such associations to engage the services of affiant, and said A. V. Ammann and the officials of the Federal Home Loan Bank Administration well knew such to be the fact. All that such special limited examination of the legal expense accounts of associations could or would or did show was that certain sums of money had been paid to affiant as attorney for the association. Such information, if desired by said A. V. Ammann or the Federal Home Loan Bank Administration, could have been obtained simply and easily by examining the Reports of Examination of said associations on file in the Federal Home Loan Bank of Los Angeles and on file with the [19154] Federal Home Loan Bank Administration in Washington,

D. C. Schedule 7 on page 14 of each Report of Examination of an association shows, among other things, the name of each attorney rendering legal services to the association and the amount of money paid to him therefor. This is the same information shown upon the books of the association and is taken from its legal expense account.

It is, therefore, affiant's information and belief and he, therefore, states the fact to be, that said "spot checks" were not made for the purpose stated in said A. V. Ammann's affidavit, but were made for the purpose of ascertaining whether the association so examined had made any contribution to the Federal Home Loan Bank Stockholders' Committee, which had theretofore been organized and, if so, the amount thereof, in order to take disciplinary action against said association, and for the purpose of intimidating all associations in the Twelfth Federal Home Loan Bank District from making such contributions.

Affiant states that the fact that such "spot checks" had been and were being made very rapidly became known to the executive officers and boards of directors of savings and loan associations in the Twelfth Federal Home Loan Bank District and that many of them were thereby intimidated and frightened into not making any contribution to the Federal Home Loan Bank Stockholders' Committee out of the assets of their respective associations for fear of reprisals against their respective associations by the defendant John H. Fahey, as Federal Home Loan Bank Commissioner.

It is, therefore, affiant's information and belief and he, therefore, states the fact to be, that said "spot checks" were made solely for the purpose of ascertaining whether the associations so examined had made contributions to the Federal [19155] Home Loan Bank Stockholders' Committee and for the purpose of intimidating all associations in the Twelfth Federal Home Loan Bank District from making any such contributions.

9. With regard to the foregoing denial that said memorandum of affiant (dated August 4, 1940, nearly six years prior to the making of said "spot checks," which "spot checks" were made nearly six years after affiant had resigned as counsel for the Federal Home Loan Bank of Los Angeles) from which memorandum it is alleged by said A. V. Ammann that it appeared that affiant, while an employee of the Los Angeles Bank, had solicited or was soliciting savings and loan associations to induce them to engage his services as attorney and that Charles E. Berry was also soliciting said associations, or some of them, to engage the services of affiant, affiant states:

About the time affiant submitted his resignation as counsel for the Los Angeles Bank, affiant considered whether he should attempt to establish a specialized counsel service for savings and loan associations in the State of California, designed to keep those associations, which might engage affiant's services, informed of developments in the law and the rules and regulations governing their opera-

tions, and of the policies of the supervisory authorities in supervising such associations. As part of such consideration, he prepared an outline of such a service and discussed it with Charles E. Berry.

Charles E. Berry had been for many years, was then, and still is, a close personal friend of affiant. Because of said Berry's long association with, and intimate knowledge of, the savings and loan industry in the State of California and elsewhere, affiant believed that his advice would be helpful to him in determining whether he should attempt to establish such a service. [19156]

Affiant also, in attempting to determine whether or not he should establish such a service, consulted a number of savings and loan executives in the State of California. The executives he consulted were and are personal and social friends whom he had known intimately for many years.

Affiant explained to each of such friends his idea and exhibited to him an outline of the service he was considering establishing and inquired of him whether, in his opinion, associations in the State of California would be interested in obtaining such a service from affiant and what monthly sum he thought either his association or other associations would be willing to pay for such service.

After each such interview with his said friends, affiant made a memorandum of his friend's reaction to the proposed establishment of such a service and of the monthly amount that such friend thought his own institution or other institutions might be willing to pay therefor.

Having completed the survey among his friends above described, affiant again consulted Charles E. Berry again seeking his advice as to whether or not affiant should undertake to establish such a service in the light of the information obtained through such survey. He showed said Berry the memorandum of his survey, discussed it with him and left it in his possession. Said Berry placed said memorandum in his personal file in the offices of the Federal Home Loan Bank of Los Angeles.

When the Federal Home Loan Bank of Los Angeles was seized by officials and employees of the Federal Home Loan Bank Administration, nearly six years later, they took possession of the personal files of said Charles E. Berry and examined the same.

Ray E. Dougherty, Associate General Counsel of the Federal Home Loan Bank Administration, testified before the House of Representatives Special Committee to Investigate Executive [19157] Agencies, which investigated the seizures of the Los Angeles Bank and of the Long Beach Federal Savings and Loan Association, as follows:

> "Mr. Fischbach (Counsel for the Committee): Did you go through any of those files [personal files of Charles E. Berry] and take any of these papers out; and specifically, did you go through the file in which Exhibit 5 or the original of Exhibit 5 was contained and retain that in the possession of the Administration?
>
> "Mr. Dougherty: I rather think I did; yes.

"Mr. Fischbach: And this is the paper that you retained?

"Mr. Dougherty: One of them. I did not retain it, no; it is still in the Bank." (Emphasis added.)

It is stated in said affidavit of A. V. Ammann that affiant's said memorandum was "transmitted to the offices of the Federal Home Loan Bank Administration in Washington, D. C." Affiant therefore, does not have, and has not seen, said memorandum since the delivery thereof to said Charles E. Berry nearly ten years ago. Consequently, affiant cannot now recall in detail the contents of said memorandum but affiant does know, and unequivocally states, that he never at any time while an employee of the Federal Home Loan Bank, or at any other time, solicited any savings and loan association, or any other person, firm or corporation whatsoever, to engage his services as an attorney.

Affiant is informed and believes and therefore states the fact to be that Charles E. Berry never, while an officer of the Federal Home Loan Bank of Los Angeles, or at any other time, solicited any savings and loan association or any other person, firm or corporation whatsoever to engage affiant's services. Charles E. Berry has, however, on more than one occasion during the years of his friendship with affiant, recommended affiant to savings and loan associations and to [19158] others seeking the services of a lawyer, but no such recommenda-

tion was ever at any time a solicitation on behalf of affiant or in any other respect improper.

/s/ RICHARD FITZPATRICK.

Subscribed and sworn to before me this 20th day of March, 1950.

[Seal] /s/ J. SCOTT WELLER,
Notary Public in and
For said County and State.

[Endorsed]: Filed March 30, 1950. [19159]

[Title of District Court and Cause.]

AFFIDAVIT OF W. I. GILBERT, JR.

State of California,
County of Los Angeles—ss.

W. I. Gilbert, Jr., being first duly sworn, deposes and says:

That he is the attorney for the plaintiff First Federal Savings and Loan Association of Wilmington. That in connection with the application of said First Federal Savings and Loan Association of Wilmington for attorney's fees the Court heretofore [19160] fixed the 15th day of March, 1950, as the date for filing of further affidavits in connection with said hearing and thereafter, upon the application of Federal Home Loan Bank of San Francisco, extended said time to March 20, 1950.

That there was filed in connection with said pro-

ceedings an affidavit of A. V. Ammann wherein the said A. V. Ammann recites certain alleged conduct to have taken place by Richard Fitzpatrick, who is one of the attorneys for some of the plaintiffs herein. That in order to protect the professional integrity of said Richard Fitzpatrick denials of said allegations are desired to be filed.

Wherefore affiant prays that leave be granted to file the affidavit of Richard Fitzpatrick countering the affidavit of A. V. Ammann.

/s/ W. I. GILBERT, JR.

Subscribed and sworn to before me this 29th day of March, 1950.

[Seal] /s/ BERNICE H. STOAKES,
Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed March 30, 1950. [19161]

[Title of District Court and Cause.]

ORDER GRANTING PERMISSION TO FILE AFFIDAVIT OF RICHARD FITZPATRICK

Upon reading the affidavit of W. I. Gilbert, Jr., requesting permission to file the affidavit of Richard Fitzpatrick countering the affidavit of A. V. Ammann; and Good Cause Appearing Therefor,

It is Hereby Ordered that said affidavit of Richard Fitzpatrick may be filed in the application of the First Federal [19162] Savings and Loan Association of Wilmington for attorney's fees.

Dated: March 29, 1950.

/s/ PEIRSON M. HALL,
Judge.

[Endorsed]: Filed March 30, 1950. [19163]

[Title of District Court and Cause.]

REASONS IN OPPOSITION TO, AND MOTION TO STRIKE, THE "MOTION FOR ORDER OF COURT REQUIRING DEFENDANTS AND CROSS-DEFENDANTS HOME LOAN BANK BOARD, ET AL., AND THEIR DEPUTIES, AGENTS, EMPLOYEES, ETC., TO APPEAR AND TESTIFY."

Come Now defendants, the Home Loan Bank Board, an agency of the Executive Branch of the Government of the United States, William K.

Divers, Chairman; J. Alston Adams, Member; and O. K. LaRoque, Member, of the Home Loan Bank Board, and the Federal Savings and Loan Insurance Corporation, an instrumentality of the United States wholly owned by the United States, John H. Fahey, A. V. Ammann and George K. Bramley, and without waiving their objections to the jurisdiction of this Court over their respective persons and their other objections including objections to the jurisdiction and to venue, but specifically hereby reserving and asserting the same, file this their Reasons in Opposition to, and Motion to Strike, the "Motion for Order of Court Requiring Defendants and Cross-Defendants [19175] Home Loan Bank Board, et al., and Their Deputies, Agents, Employees, etc., to Appear and Testify."

This Opposition and Motion are made upon all the specific grounds of jurisdiction and venue previously asserted in this cause by the parties to this Opposition, and particularly on Grounds (a) through (l) of the "Opposition, and Points and Authorities in Support Thereof, to 'Motion for Substitution of Parties Plaintiff Under (Rule 25 F.R.C.P.)'," filed by these parties on March 22, 1950.

In addition, the parties hereto oppose said Motion for Order, and move that it be stricken, upon the following grounds:

1. The relief prayed for in the motion is unreasonable, unduly burdensome, and oppressive;

2. No necessity is shown in the motion for the unusual relief therein requested;

3. The deposition of John H. Fahey is being taken by means of written interrogatories;

4. The relief requested is beyond the scope of Rule 43(e) of the F.R.C.P.;

5. The motions and the affidavits in support thereof are too vague and indefinite to justify any relief;

6. The relief sought is not necessary to enable movants to attempt to answer the affidavits heretofore filed;

7. There is no basis in law for the relief herein sought;

8. The parties seeking the extraordinary relief hereunder are not those whose motions for fees and expenses are before the Court and in connection with which the contested affidavits were filed;

9. No one named in the motion has been properly served with any process within the State of California, except A. V. Ammann;

10. No one named in the motion, to the extent that he can be now identified, is presently within the State of California, or is within 100 miles of this Court, except Irving Bogardus; [19176]

11. John M. Wyman, R. J. Strecker, and the individuals designated in the motion as "their servants, agents, deputies, employees, assistants, subordinates, and others subject to their direction and

control," to the extent they can be identified, are not parties to this action;

12. Neither a corporation nor a board can testify;

13. William K. Divers, O. K. LaRoque, and J. Alston Adams have not been sued in their individual capacities;

14. The motion is sham;

15. The information allegedly needed to answer the affidavits is either in the hands of the moving parties, or is being asked for in the Fahey deposition proceedings;

16. William K. Divers, J. Alston Adams, and O. K. LaRoque, are officers of the United States, appointed by the President with the advice and consent of the Senate. The individuals designated as "their servants, agents, deputies, employees, assistants, subordinates, and others subject to their direction and control are presumably employees of the United States without other relationship of any nature to any of the defendants herein except their employment by the United States. R. J. Strecker and John M. Wyman are employees of the United States and have no other relationship of any nature to any of the defendants herein except their employment by the United States."

Wherefore, these parties hereby oppose said Motion for Order and will move this Court at the time and place now set for the hearing on said Motion for Order that said Motion for Order be stricken.

This Opposition and Motion to strike are made on the grounds stated in this Opposition and Motion, the attached affidavits, and the files in this case.

Respectfully submitted,

ERNEST A. TOLIN,
United States Attorney.

CLYDE C. DOWNING and
PAUL FITTING,
Assistant U. S. Attorneys.

By /s/ PAUL FITTING,
Attorneys for Home Loan Bank Board; Wm. K. Divers, Chairman; J. Alston Adams, Member; and O. K. LaRoque, Member of the Home Loan Bank Board; Federal Savings & Loan Insurance Corportaion, an instrumentality of the U. S. wholly owned by the U. S.; John H. Fahey, A. V. Ammann and George K. Bramley. [19177]

AFFIDAVIT

United States District Court,
Southern District of California—ss.

Paul Fitting, being duly sworn deposes and says:

That he is an Assistant United States Attorney for the Southern District of California;

That he filed or caused to be filed in the above-cause on March 20, 1950, the following affidavits:

1. John H. Fahey dated March 18, 1950;

2. John M. Wyman dated March 17, 1950;

3. William K. Divers dated March 18, 1950;

4. John H. Fahey dated April 19, 1949;

5. R. J. Strecker dated April 22, 1949;

6. John M. Wyman dated April 19, 1949.

That the filing of such affidavits on such date was not an attempt to prevent any party to this litigation from producing appropriate contrary testimony and evidence.

/s/ PAUL FITTING.

Subscribed and sworn to before me this 4th day of April, 1950.

[Seal] EDMUND L. SMITH,
Clerk, U. S. District Court.

By /s/ WM. A. WHITE,
Deputy. [19178]

[Title of District Court and Cause.]

AFFIDAVIT OF WILLIAM F. McKENNA

William F. McKenna, being first duly sworn upon oath deposes and says:

He is an Assistant General Counsel for the Home Loan Bank Board, which is an agency of the executive branch of the Government.

He is personally acquainted with the William K. Divers, O. K. LaRoque, J. Alston Adams, John M. Wyman and R. J. Strecker, named in the "Motion for Order of Court Requiring Defendants and Cross-Defendants Home Loan Bank Board, et al.,

and Their Deputies, Agents, Employees, etc., to Appear and Testify'': [19179]

Said William K. Divers is Chairman of the Home Loan Bank Board and in said official capacity is a resident of the District of Columbia. The said William K. Divers as an individual is a resident of the State of Ohio and is not a resident of the State of California.

Said O. K. LaRoque is a member of the Home Loan Bank Board and is a resident of the District of Columbia. The said O. K. LaRoque is not a resident of the State of California.

Said J. Alston Adams is a member of the Home Loan Bank Board and in said official capacity is a resident of the District of Columbia. The said J. Alston Adams as an individual is a resident of the State of New Jersey and is not a resident of the State of California.

Said John M. Wyman is Chief Supervisor, Home Loan Bank Board, and as such his official station is in the District of Columbia. The said John M. Wyman is a resident of the State of Maryland and is not a resident of the State of California.

Said R. J. Strecker is District Examiner, Third Federal Home Loan Bank District, Home Loan Bank Board, and as such his official station is in the State of Pennsylvania. The said R. J. Strecker is a resident of the State of Pennsylvania and is not a resident of the State of California.

Affiant is informed and believes and therefore states that no one of the said William K. Divers, O. K. LaRoque, J. Alston Adams, John M. Wyman

and R. J. Strecker has ever been a resident of the State of California.

/s/ WILLIAM F. McKENNA.

Subscribed and sworn to before me this 4th day of April, 1950.

[Seal] EDMUND L. SMITH,
Clerk, U. S. District Court.

By /s/ WM. A. WHITE,
Deputy Clerk.

[Endorsed]: Filed April 4, 1950. [19180]

[Title of District Court and Cause.]

ANSWER AND OBJECTIONS OF FEDERAL HOME LOAN BANK OF SAN FRANCISCO TO MOTION OF MALLONEE, BUCKLIN AND FERGUS, THE SHAREHOLDER MEMBERS PROTECTIVE COMMITTEE OF THE LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION; LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, CROSS-CLAIMANTS AND THIRD PARTY PLAINTIFFS; TITLE SERVICE COMPANY, A CORPORATION, DEFENDANT AND CROSS-CLAIMANT IN INTERPLEADER; ROBERT H. WALLIS, DEFENDANT AND CROSS-CLAIMANT IN INTERPLEADER; AND GEORGE TURNER, DEFENDANT AND CROSS-CLAIMANT IN INTERPLEADER, FOR ORDER OF COURT REQUIRING DEFENDANTS AND CROSS-DEFENDANTS HOME LOAN BANK BOARD, ET AL., AND THEIR DEPUTIES, AGENTS, EMPLOYEES, ETC. TO APPEAR AND TESTIFY

Comes now Federal Home Loan Bank of San Francisco, defendant in civil action No. 5678-PH (W.M.), and cross-defendant and third party defendant in civil action No. 5421-PH, and without waiving any of its objections heretofore made in each of said actions as to the venue or jurisdiction of this Court over the person of this defendant or the subject matter of said actions or either thereof,

but specifically reserving and asserting said objections and each one thereof, and all of its other objections to jurisdiction and venue of this Court, and answers the motion of Mallonee, Bucklin and Fergus the Shareholder Members Protective Committee of the Long Beach Federal Savings and Loan Association, Long Beach Federal Savings and Loan Association, cross-claimants and third-party plaintiffs, Title Service Company, a corporation, defendant and cross-claimant in interpleader, Robert H. Wallis, defendant and cross-claimant in interpleader, and George Turner, defendant and cross-claimant in interpleader, for order of court requiring defendants and cross-defendants Home Loan Bank Board, et al., and their deputies, agents and employees, etc., to appear and testify, and respectfully objects to the granting of said motion or the making or entry of any order thereon, upon the grounds and authorities hereinafter set forth and those incorporated herein by reference. [19185]

I.

Federal Home Loan Bank of San Francisco hereby refers to the pleadings, motions, points and authorities and other documents hereinafter set forth in this paragraph I with like force and effect as if each one were herein set forth in full:

Complaint in Federal Home Loan Bank of Los Angeles, a body corporate, et al., plaintiffs vs. Federal Home Loan Bank of Portland, et al., defendants, Action numbered 5678 (W.M.); Motion of Federal Home Loan Bank of San Francisco to

dismiss said complaint and memorandum of points and authorities filed in support thereof; Answer of Federal Home Loan Bank of San Francisco to said complaint;

First Amended and Supplemental Complaint to Cancel the Fraudulent and Void Appointment of Conservator, to Quiet Title, For Return of Property, Declaratory Relief, Accounting and Injunction, in Action 5421; Motion of Federal Home Loan Bank of San Francisco, William A. Davis and Gerrit Vander Ende to Dismiss said First Amended and Supplemental Complaint and for Summary Judgment, and Memorandum of Points and Authorities filed in support thereof; and Answer of said Federal Home Loan Bank of San Francisco, William A. Davis and Gerrit Vander Ende to said First Amended and Supplemental Complaint;

Third-Party Complaint of Long Beach Federal Savings and Loan Association and Motion of Federal Home Loan Bank of San Francisco for Summary Judgment or to Dismiss said Third-Party Complaint in Action 5421, dated January, 1948, and Points and Authorities in Support of said motion;

Answer of Long Beach Federal Savings and Loan Association to: (a) Plaintiff's First Amended and Supplemental [19186] Complaint; (2) Cross-Claim in Interpleader of Defendant Title Service Company; (3) Cross Claim in Interpleader of Defendant Robert H. Wallis; and Amended Cross-Claim of Defendant Long Beach Federal Savings and Loan Association in Action 5421; and Supplemental to Cross-Claim to Amended Cross-Claim of De-

fendant Long Beach Federal Savings and Loan Association filed 1-12-48 with Answer to (1) Plaintiff's First Amended and Supplemental Complaint; (2) Cross-Claim in Interpleader of Defendant Title Service Company; (3) Cross-Claim in Interpleader of Defendant Robert H. Wallis, in Action 5421; Motion of Federal Home Loan Bank of San Francisco and William A. Davis and Gerrit Vander Ende to Dismiss said Amended Cross-Claim and Supplemental Cross-Claim to Amended Cross-Claim and for Summary Judgment, and Points and Authorities filed in support thereof; and the answers of said Federal Home Loan Bank of San Francisco, William A. Davis and Gerrit Vander Ende to said Amended Cross-Claim and said Supplemental Cross-Claim to said Amended Cross-Claim.

Motion of Long Beach Federal Savings and Loan Association for Order Requiring Federal Home Loan Bank of San Francisco and Federal Home Loan Bank of Loss Angeles to Deposit With the Registry of the Court Amount of Their Disputed Claims Against Long Beach Federal Savings and Loan Association From Collateral in Possession One or Both of Said Federal Home Loan Banks and to Redeliver Immediately All Excess Collateral Held by Either or Both of Such Federal Home Loan Banks;

Return of Third-Party Defendant Federal Home Loan Bank of San Francisco, to Order to Show Cause, dated February 9, 1948, and in Resistance to Motion of Long Beach Federal Savings & Loan Association verified February 9, 1948; [19187]

Order Requiring Deposit of Certain Notes, Deeds of Trust, U. S. Government Bonds and Other Collateral Held by The Federal Home Loan Bank of San Francisco;

Motion of Cross-Defendant Federal Home Loan Bank of San Francisco to Vacate and Set Aside Order of Interpleader and Impound of Its Property Made by the Above-Entitled Court on March 13, 1948, and to Dismiss Petition, Motion and Order to Show Cause of Cross-Defendant Long Beach Federal Savings and Loan Association, Upon Which Pleading Said Order Was Granted, and for an Order Directing the Clerk of the Above-Entitled Court to Return to Cross-Defendant Federal Home Loan Bank of San Francisco All of Its Notes, Securities and Other Property Now Held in the Registry of the Above-Entitled Court, and Points and Authorities Filed in Support Thereof.

II.

Federal Home Loan Bank of San Francisco, defendant, cross-defendant and third-party defendant, hereinafter referred to as San Francisco Bank, denies each and all of the allegations of said motion specifically set forth in paragraphs 2, 3, 6 and 7 thereof.

III.

San Francisco Bank denies the allegations contained in paragraph 4 of said motion, that said material could have been filed and/or served by said defendants and cross-defendants within the Court's previous requirements as to filing of objec-

tions and counter-affidavits, and alleges that said material and affidavits were filed in answer to purported evidence offered by said moving parties at the hearing on February 27 and 28, 1950, and admitted by the Court over the objections of said San Francisco Bank. [19188]

IV.

San Francisco Bank denies the allegation of paragraph 5 of said motion that Long Beach Association was ever seized or that there ever was at any time an attempted or any confiscation of said Long Beach Association.

V.

San Francisco Bank does not have sufficient information or belief to enable it to answer the statements and allegations of paragraph 8 of said motion, and basing its denial upon that ground denies each and every, all and singular the statements and allegations in said paragraph 8 contained.

VI.

San Francisco Bank alleges that each and all of the persons sought to be ordered to appear before this Honorable Court are non-residents of the State of California, and that no one of the said persons resides within the County of Los Angeles, State of California or within one hundred miles of the City of Los Angeles, State of California; that this Honorable Court has no personal jurisdiction over any of said persons sought to be brought before this Court.

VII.

Moving parties' request for production of all records and documents which are relevant and relate to the subject matter of this consolidated action or either action thereof, is indefinite and uncertain and is not a sufficient designation of the documents or papers sought to be produced, hence said motion should be denied.

VIII.

This Honorable Court is without jurisdiction to order a party to this action to produce its employees as witnesses. [19189]

IX.

This Court has no jurisdiction over the subject matter of these consolidated actions and over indispensable parties to this action and the venue is improper.

X.

The complaints, cross-claims and third-party complaints, together with all amendments and supplements thereto, seeking relief filed in these consolidated causes fail to state a cause or causes of action against this defendant and cross-defendant, or against any of the defendants or cross-defendants, upon which any relief may be granted.

XI.

The relief prayed for in said motion is unduly unreasonable and oppressive.

XII.

No necessity is shown in the motion for the

unusual and extraordinary relief therein requested.

XIII.

It appears from the face of said motion, and the supporting papers, that the alleged necessity does not exist in connection with any matters now pending before this Court, in that the moving parties state in their motion, among other things, that

> "* * * most of the allegations set forth in said affidavits and exhibits are Extraneous to the Issues of Allowances of Attorneys' Fees to the moving parties Federal Home Loan Bank of Los Angeles, et al., and First Federal Savings and Loan Association of Wilmington, et al., but if in evidenciary form, and if truthful, Would or Might in Part, be Pertinent to the Decision of Issues Concerning the Long Beach Association, * * *" [19190]

XIV.

There is no legal or valid basis for the relief herein sought.

XV.

The parties seeking the extraordinary relief hereunder are not those whose motions are now pending before this Court and in connection with which this relief is sought.

XVI.

The relief requested is not relevant or material to any matters that the moving parties now have pending before this Court, as is admitted by their motion and affidavits.

XVII.

The relief sought is not necessary to enable movants to attempt to answer the affidavits heretofore filed.

XVIII.

The motion and affidavits in support thereof are too vague, indefinite and uncertain to justify the relief sought.

XIX.

Proceedings have already been initiated and are now under way for the taking of the deposition of one of the defendants, to wit, John H. Fahey, by means of written interrogatories filed herein.

XX.

The relief requested has already been granted through the Discovery Proceedings under Rule 34 FRCP.

XXI.

The relief requested is beyond the scope of Rule 43(e) FRCP. [19191]

XXII.

The relief requested does not comply with Rule 45(e) FRCP, for the issuance of a subpoena because of the fact that all of the witnesses mentioned in said action do not reside within 100 miles of the place where this Court holds its hearings.

XXIII.

The relief requested is not authorized under Rule 26 FRCP.

XXIV.

On the further specific grounds previously asserted by this defendant and cross-defendant and particularly on the grounds (a) through (l) asserted in the "Opposition, and Points and Authorities in Support Thereof, to 'Motion for Substitution of Parties Plaintiff under (Rule 25 FRCP)' " filed herein on March 22, 1950, by the defendants and cross-defendants, commonly known in this action as the "Official Defendants," and in which opposition this defendant and cross-defendant filed in written joinder.

XXV.

That said motion and affidavits in support thereof are too vague, indefinite, uncertain, contradictory and unintelligible to support the relief sought in said motion.

XXVI.

That no one of the persons whose testimony is sought to be taken or obtained by said motion has been served within the State of California except A. V. Ammann, and the Court lacks process over each of said persons and is without jurisdiction to compel the attendance of said persons or any thereof to appear before this Honorable Court and testify. [19192]

XXVII.

That William K. Divers, O. K. LaRoque and J. Alston Adams have not been sued in their individual capacities.

XXVIII.

That John M. Wyman, R. J. Strecker, and the persons named and designated in said motion as "their servants, agents, deputies, employees, assistants, subordinates and others subject to their direction and control" are not parties to the above-consolidated action, or either one thereof, and are not within the State of California and have not been served with any process within said State.

Wherefore defendant, cross-defendant and third-party defendant Federal Home Loan Bank of San Francisco prays that said moving parties take nothing by their said motion herein and that said motion be denied, and for such other, further and different relief as to the court seems meet and just in the premises.

Dated this 1st day of April, 1950.

VERNE DUSENBERY,

PHILIP H. ANGELL,

SYLVESTER HOFFMANN, and

IRVING G. BISHOP,

By /s/ PHILIP H. ANGELL,

Attorneys for Federal Home Loan Bank of San Francisco.

[Endorsed]: Filed April 5, 1950. [19193]

[Title of District Court and Cause.]

MOTION TO DISMISS "MOTION FOR ORDER OF COURT REQUIRING DEFENDANTS AND CROSS-DEFENDANTS HOME LOAN BANK BOARD, ET AL., AND THEIR DEPUTIES, AGENTS, EMPLOYEES, ETC., TO APPEAR AND TESTIFY," AND ALL SUPPORTING PAPERS, OR IN THE ALTERNATIVE TO STRIKE THE SAME FROM THE FILES

Comes Now the defendant and cross-defendant Federal Home Loan Bank of San Francisco, through the undersigned, its attorneys, and without waiving its objections to the jurisdiction of this Court over its person, and its other objections, including objections to jurisdiction and to venue, but specifically reserving, preserving and asserting the same, and moves this United States District Court to make an order dismissing the said "Motion for Order of Court Requiring Defendants and Cross-Defendants Home Loan Bank Board, et al., and Their Deputies, Agents, Employees, etc., to appear and Testify," or to strike it and all supporting papers filed in connection therewith, from the files of this Court. Said motion is based and is made upon the following grounds:

1. This Court has no jurisdiction over the subject matter of these consolidated actions and over indispensable parties to this action and the venue is improper.

2. The complaints, cross-claims and third-party complaints, together with all amendments and supplements thereto, seeking relief filed in these consolidated causes fail to state a cause or causes of action against this moving defendant and cross-defendant, or against any of the defendants or cross-defendants upon which any relief may be granted.

3. The relief prayed for in said motion is unduly unreasonable and oppressive.

4. No necessity is shown in the motion for the unusual and extra-ordinary relief therein requested.

5. It appears from the face of said motion, and the supporting papers, that the alleged necessity does not exist in connection with any matters now pending [19200] before this Court, in that the moving parties state in their motion, among other things, that

> "* * * most of the allegations set forth in said affidavits and exhibits are Extraneous to the Issues of Allowances of Attorneys' Fees to the moving parties Federal Home Loan Bank of Los Angeles, et al., and First Federal Savings and Loan Association of Wilmington, et al., but if in evidenciary form, and if truthful, Would or Might in Part, Be Pertinent to the Decision of Issues Concerning the Long Beach Association, * * *"

6. There is no legal or valid basis for the relief herein sought.

7. The parties seeking the extra-ordinary relief

hereunder are not those whose motions are now pending before this Court and in connection with which this relief is sought.

8. The relief requested is not relevant or material to any matters that the moving parties now have pending before this Court, as is admitted by their motion and affidavits.

9. The relief sought is not necessary to enable movants to attempt to answer the affidavits heretofore filed.

10. The motion and affidavits in support thereof are too vague, indefinite and uncertain to justify the relief sought.

11. Proceedings have already been initiated and are now underway for the taking of the deposition of one of the defendants, to wit: John H. Fahey, by means of written interrogatories filed [19201] herein.

12. The relief requested has already been granted through the Discovery Proceedings under Rule 34 FRCP.

13. The relief requested is beyond the scope of Rule 43(e) FRCP.

14. The relief requested does not comply with Rule 45 (e) FRCP, for the issuance of a subpoena because of the fact that all of the witnesses mentioned in said motion do not reside within 100 miles of the place where this Court holds its hearings.

15. The relief requested is not authorized under Rule 26 FRCP.

16. On the further specific grounds previously asserted by this defendant and cross-defendant and particularly on the grounds (a) through (1) asserted in the "Opposition, and Points and Authorities in Support Thereof, to 'Motion for Substitution of Parties Plaintiff Under (Rule 25 FRCP)'" filed herein on March 22, 1950, by the defendants and cross-defendants, commonly known in this action as the "Official Defendants," and in which opposition this moving defendant and cross-defendant filed its writen joinder.

17. Said motion is and the relief called for is immaterial, and needlessly burdens a record already suffering from elephantiasis, consisting of over 14,000 pages of pleadings and thousands upon thousands of recorded words, without as yet resulting in the taking of a single deposition of a single witness, and but further delaying progress toward an eventual trial of these actions upon the merits.

18. The moving parties have not exhausted the available administrative remedies.

19. Said motion is filed for the purposes of delay. [19202]

That this motion is based upon all papers, files, documents and records in the above-entitled action and upon the notice and motion, affidavits and memorandum of points and authorities, and upon the grounds set forth in said motion.

Wherefore, defendants pray this Honorable Court make its Order or Orders:

1. Dismiss and deny all relief prayed for in the "Motion for Order of Court Requiring Defendants and Cross-Defendants Home Loan Bank Board, et al., and Their Deputies, Agents, Employees, etc., to Appear and Testify," or in the alternative,

2. That said "Motion for Order of Court Requiring Defendants and Cross Defendants Home Loan Bank Board, et al., and Their Deputies, Agents, Employees, etc., to Appear and Testify" and each and all of the supporting papers filed therewith be stricken from the files of this Court.

3. For such other relief as this Court deems meet and proper.

Dated: April 4th, 1950.

VERNE DUSENBERRY,

PHILIP H. ANGELL,

IRVING G. BISHOP,

SYLVESTER HOFFMANN,

By /s/ SYLVESTER HOFFMANN,

Attorneys for Defendant and Cross Defendant Federal Home Loan Bank of San [19203] Francisco.

[Title of District Court and Cause.]

AFFIDAVIT OF RESIDENCE OF IRVING BOGARDUS

State of California,
City and County of San Francisco—ss.

Irving Bogardus being first duly sworn, deposes and says: [19211]

That he is the Irving Bogardus named in the motion of Mallonee, Bucklin and Fergus, et al., Long Beach Federal Savings and Loan Association, Title Service Company, Robert H. Wallis and George Turner, for an order of court requiring defendants and cross-defendants Home Loan Bank Board, et al., and their deputies, agents, employees, etc., to appear and testify; said affiant is the former Acting President of the Federal Home Loan Bank of San Francisco; that said affiant does not now and never has resided in the County of Los Angeles, State of California, nor within 100 miles thereof; that said affiant now resides and for more than 1½ years last past has resided in the City of Tigard, County of Washington, State of Oregon; said affiant is now and for many years last past has been one of the Vice Presidents of the Federal Home Loan Bank of San Francisco and at the present time is employed in the San Francisco office of said Federal Home Loan Bank of San Francisco in the City and County of San Francisco, State of California, and said affiant does not now contemplate being personally present within the County of Los Angeles,

State of California, nor within 100 miles thereof within the immediate future.

Further affiant saith not.

/s/ IRVING BOGARDUS.

Subscribed and sworn to before me this 1st day of April, 1950.

[Seal] /s/ CLARA H. COOPER,
Notary Public in and for the City and County of San Francisco, State of California.

My commission expires January 10, 1953. [19212]

In the District Court of the United States
In and for the Southern District of California
Central Division

Civil Action No. 5421 P.H.

(and consolidated, related and enjoined actions No. 5678 P.H. in said Southern District, No. 7989, W.M. in said Southern District, No. 28203-G in the Northern District, and No. 14492 in the Superior Court of California)

MALLONEE, et al.,

Plaintiffs,

vs.

FAHEY, et al.,

Defendants.

FEDERAL HOME LOAN BANK OF LOS ANGELES, et al.,

Plaintiffs,

vs.

FEDERAL HOME LOAN BANK OF PORTLAND, et al., also sometimes known and referred to as the Federal Home Loan Bank of San Francisco, et al.,

Defendants.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER FOR SUBSTITUTION OF PARTIES PLAINTIFF

The Plaintiffs, Flora E. Mallonee, Mabel E. Fergus and Winnie Bucklin, the presently consti-

tuted Shareholder Members Protective Committee of the Long Beach Federal Savings and Loan Association, in the above-entitled class action, having filed on March 14, 1950, their Motion for Substitution of Parties Plaintiff, with supporting affidavits and points and authorities, and Notice of the time and place of hearing thereof, having been duly served upon counsel of record for all interested parties, and there having been no written [19216] objection filed to said motion, excepting only the opposition, filed by the defendants the Home Loan Bank Board, William K. Divers, J. Alston Adams, O. K. LaRoque, the Federal Savings and Loan Insurance Corporation, John H. Fahey, A. V. Ammann, and George K. Bramley, which opposition was joined in by the defendant Federal Home Loan Bank of San Francisco, and no others, the said Motion for Substitution of Parties Plaintiff, came on regularly for hearing in courtroom No. 1 in the Post Office and Federal Building at Los Angeles, on Monday, March 27, 1950, at the hour of 10 o'clock a.m., and there then and there appearing—

1. Wyckoff Westover, Esquire, of the firm of Westover & Smith, representing the plaintiffs, Shareholder Members Protective Committee of the Long Beach Federal Savings and Loan Association, and

2. Paul Fitting, Assistant United States Attorney, on behalf of Ernest A. Tolin, United States Attorney, and William H. McKenna, Esquire, Assistant Counsel for the Home Loan Bank Board,

representing the defendants, the Home Loan Bank Board, William K. Divers, J. Alston Adams, O. K. LaRoque, the Federal Savings and Loan Insurance Corporation, John H. Fahey, A. V. Amman and George K. Bramley, and

3. Irving G. Bishop, Esquire, on behalf of Verne Dusenbery, Philip A. Angell, Irving G. Bishop and Sylvester Hoffmann, Esquires, attorneys representing the defendant Federal Home Loan Bank of San Francisco, and

4. Charles K. Chapman, Esquire, representing the cross-complainant Long Beach Federal Savings and Loan Association;

And there having been presented no affidavits or oral or documentary evidence other than that submitted by the plaintiffs, and the matter having been argued and submitted, and the court being fully advised in the premises, Now Finds: [19217]

Findings of Fact

1. That the plaintiffs herein Flora E. Mallonee, Mabel Fergus and Willie Bucklin, are the presently duly and regularly licensed Shareholder Members Protective Committee of the Long Beach Federal Savings and Loan Association, (License No. 80282 LA, Receipt No. LA 69192, renewed January 1, 1950, issued pursuant to Chapter 385 of the Statutes of 1949 of the State of California, Department of Investment, Division of Corporations), and

2. That Notice of the hearing of said Motion for

Substitution of parties plaintiff, was duly and regularly given.

3. That this Court has heretofore after extended hearings, by various orders, held that it has jurisdiction of the parties and subject matter of the within litigation, from certain of which orders appeals were taken by the Home Loan Bank Board and/or its agents, and thereafter dismissed, and upon which order, as well as said other orders so holding, the time to appeal has passed for a considerable period.

4. That the above-entitled class action was instituted on May 27, 1946, by Paul L. Mallonee, Winnie Bucklin, and C. H. Newhouse, for and on behalf of the shareholder members of the Long Beach Federal Savings and Loan Association, and

5. That said Paul L. Mallonee, Winnie Bucklin, and C. H. Newhouse were then a duly constituted Shareholder Members Protective Committee, and became duly licensed by the Department of Investment of the State of California, Division of Corporations, License No. 80282 LA.

6. That on May 19, 1948, C. H. Newhouse passed away in the City of Long Beach, County of Los Angeles, State of California.

7. That thereafter Mabel E. Fergus was duly substituted in the place and stead of C. H. Newhouse, deceased, to be a member of said Shareholder Members Protective Committee.

8. That on June 3, 1949, Paul L. Mallonee passed away in the City of Long Beach, County of Los Angeles, State of California. [19218]

9. That thereafter his widow, Flora E. Mallonee, was duly and regularly substituted in the place and stead of her husband, said Paul L. Mallonee, deceased, to be a member of said Shareholder Members Protective Committee.

10. That at all times since the commencement of this class action, the Shareholder Members Protective Committee has been duly and regularly constituted and has been the real plaintiff in the above-entitled class action.

Conclusions of Law

From the foregoing Findings of Fact the court now makes and renders its Conclusions of Law, that:

1. The above-entitled class action did not abate by the death of said C. H. Newhouse, nor by the death of said Paul L. Mallonee, nor at all, but survives and continues as a class action for and on behalf of all of the shareholder members of the Long Beach Federal Savings and Loan Association, and as to all other issues and matters raised by the pleadings of the various parties.

2. That the motion for the substitution of Mabel E. Fergus in the place and stead of C. H. Newhouse, deceased, and for the substitution of Flora E. Mallonee in place and stead of Paul L. Mallonee, deceased, should be granted.

Judgment

Wherefore, It Is Hereby Ordered, Adjudged and Decreed that the Motion of the plaintiffs Flora E. Mallonee, Mabel E. Fergus, and Winnie Bucklin, the presently constituted Shareholder Members Protective Committee of the Long Beach Federal Savings and Loan Association, to be substituted as plaintiffs in the above-entitled action be and is hereby granted, and the said

1. Mabel E. Fergus is substituted in place and stead of C. H. Newhouse, deceased, to be a plaintiff in the above-entitled class action, and [19219]

2. Flora E. Mallonee is substituted in place and stead of Paul L. Mallonee, deceased, to be a plaintiff in the above-entitled class action.

3. This Order of Substitution of parties plaintiffs is a final judgment and the court expressly determines that there is no just reason for delay and expressly directs and orders the forthwith entry of this judgment of substitution of parties plaintiff.

Dated at Los Angeles, this 5th day of April, 1950.

/s/ PEIRSON M. HALL,
Judge of the United States
District Court.

Judgment entered Apr. 5, 1950.

Docketed Apr. 5, 1950.

[Endorsed]: Filed April 5, 1950. [19220]

United States District Court, Southern District of California, Central Division

NOTICE BY CLERK OF ENTRY OF JUDGMENT

Ernest T. Tolin, U. S. Atty.,
Paul Fitting, Asst. U. S. Atty.,
William F. McKenna, Esq.,
600 Federal Building,
Los Angeles 12, Calif.

Westover & Smith, Esqs.,
215 West Sixth Street,
Los Angeles 14, Calif.

Charles E. Chapman, Esq.,
Ocean Center Building,
Long Beach 2, Calif.

Bishop & Hoffmann, Esqs.,
Philip H. Angell, Esq.,
Verne Dusenbery, Esq.,
215 West Fifth Street,
Los Angeles 13, Calif.

Re: Mallonee, et al., v. Fahey, et al., No. 5421-P.H.; Fed. Home Loan Bank of Los Angeles v. Fed. Home Loan Bank of Portland, No. 5678-P.H.; Newendorp, et al., v. Gregory, et al., No. 7989-P.H.

You are hereby notified that Findings of Fact, Conclusions of Law and Order Substituting Parties

Plaintiff, has been entered this day in the above-entitled case, in Judgment Book No. 65, page 99.

Dated: Los Angeles, California, April 5, 1950.

EDMUND L. SMITH,
Clerk,

By C. A. SIMMONS,
Deputy Clerk.

Mailed April 6, 1950. [19223]

[Title of District Court and Cause.]

AFFIDAVIT OF SERVICE BY MAIL OF AFFIDAVIT OF RICHARD FITZPATRICK COUNTERING AFFIDAVIT OF A. V. AMMANN IN OPPOSITION TO MOTION AND PETITION OF PLAINTIFF FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF WILMINGTON FOR ALLOWANCE OF ATTORNEY'S FEES AND COSTS IN CLASS ACTION

State of California,
County of Los Angeles—ss.

Bernice H. Stoakes, being first duly sworn, deposes and says:

That affiant is a citizen of the United States and a resident of the County of Los Angeles; that affiant is over the age of eighteen years and is not a party to the within and above entitled action; that affiant's business address is 939 Rowan [19224]

Building, Los Angeles 13, California; that on the 30th day of March, 1950, affiant served copies of Affidavit of Richard Fitzpatrick Countering Affidavit of A. V. Ammann in Opposition to Motion and Petition of Plaintiff, First Federal Savings and Loan Association of Wilmington, for Allowance of Attorney's Fees and Costs in Class Action on counsel of record for certain of the parties to the above-entitled consolidated actions at the addresses as set forth as follows:

Ernest A. Tolin, United States Attorney, 600 Federal Building, Los Angeles, California;

William S. McKenna, Esq., 101 Indiana N.W., Washington, D. C.;

Richard Fitzpatrick, 756 South Broadway, Los Angeles 14, California;

O'Melveny & Myers, 433 South Spring Street, Los Angeles 13, California;

Messrs. Bishop and Hoffmann, 810 Chester Williams Building, Los Angeles 13, California;

F. Henry NeCasek, Esq., 3233 East Anaheim Street, Long Beach 4, California;

Albert A. Rosenshine, Esq., and James E. Burns, Esq., 111 Sutter Street, San Francisco 4, California;

Charles Dal Sooy, Esq., 220 Montgomery Street, San Francisco 4, California;

Messrs. Linnell & Smith, 401 Jergins Trust Building, Long Beach 2, California;

McIntyre Faries, Esq., 812 Subway Terminal Building, Los Angeles 13, California;

Thomas F. Menzies, Esq., Rowan Building, Los Angeles 13, California;

Messrs. Westover and Smith, 1009 Pacific Southwest Building, Los Angeles 14, California; [19225]

Charles K. Chapman, Esq., Ocean Center Building, Long Beach 2, California;

Lyman B. Sutter, Esq., 512 Jergins Trust Building, Long Beach 2, California;

Raymond Tremaine, Esq., 1007 Van Nuys Building, Los Angeles 14, California;

by placing a true copy thereof in an envelope addressed to each of said names and addresses as listed herein, and by then sealing said envelopes and depositing the same, with postage thereon fully prepaid, in the United States Post Office at Los Angeles, California, where is located the office of the attorney for First Federal Savings and Loan Association of Wilmington by and for whom said service was made.

Affiant further alleges that there is delivery service by United States mail at the place so addressed and there is a regular communication by mail between the place of mailing and the places so addressed.

/s/ BERNICE H. STOAKES.

Subscribed and sworn to before me this 6th day of April, 1950.

[Seal] /s/ ROSE SCHINDELMAN,
Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed April 7, 1950. [19226]

[Title of District Court and Cause.]

AFFIDAVIT OF PAUL FUSSELL SUPPLEMENTING HIS AFFIDAVIT FILED IN SUPPORT OF MOTION FOR ATTORNEYS' FEES AND SUPPLEMENT THERETO

State of California,
County of Los Angeles—ss.

Paul Fussell, being first duly sworn, deposes and says:

He is, and was at all times herein mentioned a partner of O'Melveny & Myers and one of the attorneys for the Federal Home Loan Bank of Los Angeles and for the five of the six association plaintiffs in Action No. 5678-P.H. represented by Richard FitzPatrick and O'Melveny & Myers.

This affidavit is supplemental to affiant's affidavit in support of the motion of plaintiffs in said Action No. 5678-P.H. for order directing payment of attorneys' fees on account filed herein on January 6, 1949, and the supplement thereto filed herein on July 8, 1949.

Affiant has reviewed the time records kept by O'Melveny & Myers relating to the above-entitled consolidated actions to determine the amount of time spent by affiant and other attorneys of O'Melveny & Myers in services which might be considered to [19228] have been rendered to the Federal Home Loan Bank Stockholders Committee, sometimes

called the FHLB Committee, or the FHLB Committee of the California Savings and Loan League.

After such review, affiant states that no time was spent on said services by attorneys connected with O'Melveny & Myers, during the period from March 29, 1946 to June 30, 1949, both dates inclusive (the period covered by said motion and said supplement thereto), except not to exceed 31 hours of affiant's time and not to exceed 30½ hours for Roy B. Woolsey, an attorney then employed by O'Melveny & Myers.

Said services were rendered in collaboration with Richard FitzPatrick, Esq., and consisted of preparing an application to the California Commissioner of Corporations for a license to said Federal Home Loan Bank Stockholders Committee; research on and preparation of an opinion that members of the Federal Home Loan Bank of Los Angeles might lawfully make contributions to said Committee; attendance at Committee meetings; preparation or examination of Committee reports to members of the Federal Home Loan Bank of Los Angeles and to others; and communications to and from Committee members relating to Committee matters. Of the matters mentioned in this paragraph, research was done by said Roy B. Woolsey and the other services were performed by affiant.

The object and purpose of said Committee members, and of said five association plaintiffs, was at all said times and is the restoration of the Federal Home Loan Bank of Los Angeles and the twelfth Federal Home Loan Bank District, and all ser-

vices rendered by affiant and other attorneys connected with O'Melveny & Myers, as set forth in the affidavits filed in support of said [19229] motion and said supplemental motion, were rendered by them in furtherance of said object and purpose.

Affiant further states, with reference to the participation in the pending motion of said five member associations who are plaintiffs in Action 5678-P.H., that all services rendered for and on behalf of Federal Home Loan Bank of Los Angeles by atttorneys connected with O'Melveny & Myers also inured to the benefit of said member associations; that there is no reason for an apportionment of fees as between said Federal Home Loan Bank of Los Angeles and said associations in that an award to said Federal Home Loan Bank of Los Angeles would constitute an adequate compensation for all services rendered for the common benefit of said Federal Home Loan Bank of Los Angeles and said member associations and would eliminate the possibility of a duplication of fees for the same services; and that no services were rendered for said member associations other than those rendered for and on behalf of said Federal Home Loan Bank of Los Angeles as aforesaid.

Affiant also states that it will be necessary for Richard FitzPatrick and O'Melveny & Myers to render further services in the above-entitled actions in connection with preparation for trial, trial, an appeal now pending, and other proceedings in connection with the prosecution of said causes; and

that said Federal Home Loan Bank of Los Angeles is without funds to compensate its counsel for the rendition of such services.

/s/ PAUL FUSSELL.

Subscribed and sworn to before me this 6th day of April, 1950.

[Seal] /s/ CARRIE VAUGHN,
Notary Public in and
For said County and State.

[Endorsed]: Filed April 7, 1950. [19230]

[Title of District Court and Cause.]

AFFIDAVIT OF RICHARD FITZPATRICK SUPPLEMENTING HIS AFFIDAVITS FILED IN SUPPORT OF MOTION FOR ATTORNEYS' FEES AND SUPPLEMENT THERETO

State of California
County of Los Angeles—ss.

Richard Fitzpatrick, being first duly sworn, deposes and says:

He is one of the attorneys for the Federal Home Loan Bank of Los Angeles and is one of the attorneys for five of the six association plaintiffs in Action No. 5678-P.H.

This affidavit is supplemental to his affidavits in

support of the motion of said plaintiffs in Action No. 5678-P.H. [19232] for order directing payment of attorneys' fees on account filed herein January 6, 1949, and the supplement thereto filed herein on July 8, 1949.

Affiant has reviewed his records, papers, files and time sheets relating to the above-entitled consolidated actions to determine the amount of time spent by affiant in services which might be considered to have been rendered to the Federal Home Loan Bank Stockholders Committee, sometimes called the FHLB Committee, or the FHLB Committee of the California Savings and Loan League.

After such review, affiant states that the time spent by him in rendering said services does not exceed 150 hours during the period from March 29, 1946 to June 30, 1949, both dates inclusive, the period covered by his said affidavits filed in support of said motion. 150 hours is 7.3% of the 2056.3 hours shown in said affidavits to have been spent by affiant in rendering the services set forth in said affidavits.

A statement of the general nature of said services is as follows: collaboration with Paul Fussell, Esq., in the preparation of an application to the Commissioner of Corporations of the State of California for the issuance of a license to said Federal Home Loan Bank Stockholders Committee; collaboration with Mr. Fussell in the preparation of an opinion that members of the Federal Home Loan Bank of Los Angeles might lawfully make contributions to said Committee; the attendance at Com-

mittee meetings; the preparation of minutes of such meetings; the preparation of Committee reports to the members of the Federal Home Loan Bank of Los Angeles and to others; and correspondence with and telephone calls to and from the Committee members relating to Committee matters.

The object and purpose of said Committee members was and is the restoration of the Federal Home Loan Bank of Los [19233] Angeles and the Twelfth Federal Home Loan Bank District and all services rendered by affiant, as set forth in his said affidavits filed in support of said motion for order directing payment of attorneys' fees, were rendered by him in furtherance of the attainment of said object and purpose.

Affiant further states with reference to the participation in the pending motion of the five association plaintiffs in Action No. 5678-P.H. represented by affiant and O'Melveny & Myers, all that services rendered by him for and on behalf of said Home Loan Bank of Los Angeles also inured to the benefit of the said member associations; that there is no reason for an apportionment of fees as between said Los Angeles Bank and said associations in that an award to said Bank would constitute an adequate compensation for all services rendered for the common benefit of said Bank and said member associations and would eliminate the possibility of a duplication of fees for the rendition of the same services; that no services were rendered for said member associations other than those rendered for

and on behalf of said Los Angeles Bank as aforesaid.

Affiant also states that it will be necessary to render further services in the above-entitled consolidated actions in connection with trial, preparation for trial, and the appeal from this Court's order of preliminary injunction now pending and other proceedings in connection with the prosecution of said causes; and that said Los Angeles Bank is without funds to compensate its counsel for the rendition of such services.

/s/ RICHARD FITZPATRICK.

Subscribed and sworn to before me this 6th day of April, 1950.

[Seal] /s/ J. SCOTT WELLER,
Notary Public in and
For said County and State.

Receipt of Copy Acknowledged.

[Endorsed]: Filed April 7, 1950. [19234]

At a stated term, to-wit: The February Term. A.D. 1950, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Friday the 7th day of April in the year of our Lord one thousand nine hundred and fifty.

Present: The Honorable: Peirson M. Hall, District Judge.

[Title of Cause.]

For hearing on (1) motion of plaintiff Federal Home Loan Bank of Los Angeles for order directing payment of attorney fees on account filed Jan. 6, 1949, and supplement filed July 8, 1949; (2) motion of First Federal Savings & Loan Assoc. of Wilmington for order directing payment of attorney fees on account, filed Feb. 10, 1950; (3) motion of plaintiff (5678) and defendant, third-party defendant, cross-claimant and cross-defendant (5421) Federal Home Loan Bank of Los Angeles, for order directing repayment of moneys heretofore advanced by Shareholders Protective Committee, filed Jan. 6, 1949, and supplement filed July 8, 1949; (4) motion of plaintiffs, et al., for order requiring and ordering certain defendants, cross-defendants and third-party defendants to appear and testify, pursuant to notice filed March 28, 1950; and (5) motion of defendants and cross-defendant Federal Home Loan Bank of San Francisco to dismiss the "Motion for order of court re-

quiring defendants and cross-defendants Home Loan Bank Board, et al., to appear and testify'' or to strike it and all supporting papers filed in connection therewith, from the files, pursuant to notice filed April 5, 1950;

Wyckoff Westover, Esq., appearing as counsel for plaintiffs and Shareholders Protective Committee; W. I Gilbert, Jr., Esq., appearing as counsel for First Federal Savings & Loan Assoc., Wilmington; Chas. K. Chapman, Esq., appearing as counsel for defendant Long Beach Federal Savings & Loan Assoc.; Lyman B. Sutter, Esq., [19240] appearing as counsel for Title Service Co.; Raymond Tremaine, Esq., appearing as counsel for defendant Robert H. Wallis; Richard Fitzpatrick, Pierce Works, John Whyte, and Paul Fussell, Esqs., appearing as counsel for Federal Home Loan Bank of Los Angeles; Irving Bishop, Verne Dusenbery, and Phillip N. Angell, Esqs., appearing as counsel for defendants Federal Home Loan Bank of San Francisco; Paul Fitting, Ass't U. S. Att'y, and Wm. F. McKenna, Esq., of general counsel, appearing as counsel for Federal Home Loan Bank Board, John H. Fahey, and A. V. Ammann;

Filed affidavit, and service of affidavit of R. Fitzpatrick in opposition to affidavit of A. V. Ammann.

Pursuant to stipulation it is ordered that Item 3 be stricken from the calendar, to be re-set on notice.

Court hears statements of the parties re Items 4 from the calendar, to be re-set on notice.
and 5, respectively, and orders said items stricken

Affidavits of Paul Fussell and Richard Fitzpatrick, respectively, in re attorney fees, are filed.

Exhibit 2-27-50-19 for Long Beach Federal Savings & Loan Assoc. is marked for ident. and admitted in evidence.

Frank Noon, heretofore sworn, is called and testifies.

At 5 P.M. court recesses. At 7 P.M. court reconvenes herein and all being present as before, including counsel for both sides;

Exhibits 2-27-50-20 to 57 of Long Beach Federal Savings & Loan Assoc., and Exhibits 2-27-50-F and G of Federal Home Loan Bank of San Francisco, respectively, are marked for ident. and admitted in evidence.

At 11:30 P.M. Court declares a recess in these proceedings to 10 A.M., April 8, 1950. [19241]

[Title of District Court and Cause.]

LILLIAN A. COGGSWELL,
Appellant for Intervention.

NOTICE OF MOTION FOR LEAVE TO INTERVENE

To the Plaintiffs, and their attorneys, Westover and Smith;

To Long Beach Federal Savings and Loan Association, Third Party plaintiff and cross-claimant, and Charles K. Chapman, Esq., its [19508] attorney;

To Title Service Company, defendant and cross-claimant in interpleader, and Lyman B. Sutter, Esq., its attorney;

To Robert H. Wallis, defendant and cross-claimant in interpleader, and Raymond Tremaine, Esq., his attorney;

To First Federal Savings and Loan Association of Wilmington, and W. I. Gilbert, Jr., Esq., its attorney;

To Federal Home Loan Bank of Los Angeles, defendant, third-party defendant and cross-claimant, and O'Melveny and Myers and Richard Fitzpatrick, Esq., its attorneys;

To Federal Home Loan Bank of San Francisco, also sometimes known and referred to as Federal Home Loan Bank of Portland, defendant and third-party defendant and to Sylvester Hoffman and Irving G. Bishop, Verne Dusenbery and Philip H. Angell, its attorneys;

To Ben A. Perham, Fred J. Bradshaw, William A. Davis, M. L. Carrier, I. W. Dinsmore, Douglas H. Driggs, R. G. Fremou, L. H. Hoffman, Guy E. Jaques, C. W. Leaphart, L. C. Wetzel, Gerritt Vander Ende, Paul Bartling, W. D. Hopping, J. W. Maxwell, W. O. McCaw, Worth D. Wright, Frank R. Johnson, Irving Bogardus, R. Floyd Hewitt, J. H. Andrews, C. N. Bloomfield, and P. C. Bulen, defendants and cross-defendant, and Irving G. Bishop, Sylvester Hoffman, Verne Dusenbery and Philip H. Angell, their attorneys;

To Roy E. Hegg, defendant and cross-claimant and F. Henry Necasek, his attorney;

To Pioneer Investors Savings and Loan Association, a corporation, Home Mutual Savings and Loan Association, a corporation, California Savings and

Loan Company, a corporation, Thrift Federal Saving and Loan Association, a corporation, San Francisco Federal Savings and Loan Association, a corporation, Community Savings and Loan Associiation, a corporation, Oakland Federal Savings and Loan Association, a corporation, Citizens' Federal Savings and Loan Association, a corporation, Berkeley [19509] Guarantee Savings and Loan Association, a corporatioin, and Golden West Savings and Loan Association, a corporation, defendants and cross-defendants, and all the officers and directors respectively, thereof, and Albert A. Rosenshine, James E. Burns, and Charles Dal Sooy, their attorneys;

To Home Loan Bank Board, an entity, William K. Divers, Chairman, J. Alston Adams, member, and O. K. La Roque, member, John H. Fahey, individually and as Chairman of the Federal Home Loan Bank Board, A. V. Ammann, individually, and George K. Bramley, individually, and Federal Savings and Loan Insurance Corporation, defendant and cross-defendant, and Ernest A. Tolin, U. S. Attorney, and Paul Fitting, Assistant U. S. Attorney, their attorneys:

You Will Please take Notice that on Monday, the first day of May, 1950, at 10:00 o'clock a.m., of said day or as soon thereafter as Counsel can be heard, Lillian A. Coggswell, by her counsel, will move the Court for an Order allowing the filing of the accompanying Complaint in Intervention.

Said Motion will be made and based upon this notice and the accompanying Motion for Leave to

Intervene, Complaint in Intervention and Affidavit in Support thereof; a copy of each of said documents is served herewith.

Dated this 12th day of April, 1950.

/s/ FRANK G. MAKEPEACE,
Attorney for Intervenor.

[Endorsed]: Filed April 13, 1950. [19510]

[Title of District Court and Cause.]

LILLIAN A. COGGSWELL,
Applicant for Intervention,

MOTION FOR LEAVE TO INTERVENE

To the Honorable, the District Court of the United States, in and for the Southern District of California, Central Division.

Comes Now, the above-named applicant for intervention, and moves the Court for leave to intervene in the above-entitled action. Said motion is based upon the following grounds: [19511]

I.

That she is the purchaser and assignee of a promissory note and deed of trust upon a parcel of real property described in the proposed complaint in intervention, a copy of which proposed complaint in intervention is attached hereto as Exhibiit A and incorporated herein by reference.

That defendant Long Beach Federal Savings and

Loan Association was the beneficiary under that certain deed of trust dated the first day of October, 1943, and recorded October 11, 1943, in Book 20322, Page 207 of Official Records, County of Los Angeles, California, securing a promissory note of even date in the amount of Twelve Hundred ($1200.00) Dollars, payable in accordance with the terms thereof, which said note has an unpaid balance of Six Hundred Thirty-One and 78/100ths ($631.78) as of April 4, 1946.

That she is the assignee of said note and deed of trust, by virtue of an instrument of assignment, executed on October 11, 1946, by A. V. Ammann as Conservator of Long Beach Federal Savings and Loan Association. Said instrument was acknowledged by said Ammann on October 11, 1946, and was recorded on October 15, 1946, in Book 23641, at Page 121 of Official Records of the County Recorder of Los Angeles County, State of California.

That defendant, Title Service Company, a corporation, is the trustee under said deed of trust.

II.

That applicant for intervention desires the authorization and Order of this Court directing the said defendant, Title Service Company as trustee under said deed of trust, to proceed with the sale of said property in accordance with the power of sale provision contained in said deed of trust.

III.

That because of litigation arising over the seiz-

ure [19512] and possession of said Long Beach Federal Savings and Loan Association, the said trustee, Title Service Company is unwilling to conduct the sale of said property secured by said deed of trust, unless authorized so to do by this Court, and as a result thereof, the Title to said property is in jeopardy and intervenor is in danger of suffering irreparable loss.

IV.

That the sale of said property, if authorized by this Court, could be made without prejudice to the rights of litigants in this action in such manner as not to, in any way, affect the issues involved in this pending litigation.

V.

That applicant for intervention has the right to intervene under Rule 24 (a) of the Federal Rules of Civil Procedure on the ground that she is so situated as to be adversely affected by a distribution or other disposition of property in the custody of or subject to the control or disposition of this Court or an Officeer thereof.

Wherefore, Applicant respectfully prays:

1. That this Court make its Order granting her leave to file the proposed complaint in intervention in the above-entitled action;

2. That this Court issue an Order to show cause why the relief in said proposed complaint in intervention should not be granted;

3. That she have such other and further relief as to this Court may seem just.

Dated March 31, 1950.

/s/ FRANK G. MAKEPEACE,
Attorney for Applicant
For Intervention.

[Endorsed]: Filed April 13, 1950. [19513]

[Title of District Court and Cause.]

LILLIAN A. COGGSWELL,
Plaintiff in Intervention.

COMPLAINT IN INTERVENTION

Comes Now the above named intervenor and files her Complaint in Intervention in the above-entitled cause and alleges:

I.

That Intervenor is so situated as to be adversely affected by distribution or other disposition of property which is in the custody or subject to the control or disposition of the Court or [19514] an officer thereof.

II.

That defendant Long Beach Federal Savings and Loan Association, an association, organized and existing under and by virtue of the laws of the United States of America, was the named beneficiary under that certain deed of trust dated the 1st day of October, 1943, and recorded October 11,

1943, in Book 20322, Page 207, of Official Records, County of Los Angeles, California, securing a certain promissory note of even date in the face amount of Twelve Hundred ($1200.00) Dollars. Said note and deed of trust were executed by Frank E. Russell as maker and trustor, and assumed, in writing, by L. E. McCleary. Said note has an unpaid balance of Six Hundred Thirty-one and 78/100th ($631.78) Dollars.

That on or about October 11, 1946, defendant A. V. Ammann, representing himself as Conservator of the Long Beach Federal Savings and Loan Association, the named beneficiary under said deed of trust, granted, assigned and transferred to Lillian A. Coggswell, intervenor herein, all beneficial interest of said association under said deed of trust together with the note for which said deed of trust was security, the money due and to become due on said note with interest, and all rights accrued or to accrue under said deed of trust.

That defendant Title Service Company, a corporation, is the trustee under said deed of trust.

III.

That said deed of trust conveyed the legal title and ownership of the hereinafter described real property to the said trustee therein named, defendant, Title Service Company, upon the terms and conditions contained in said deed of trust. The property so described is as follows:

Lots 45 and 46 of Signal Park Tract, No. 2, in the City of Long Beach, County of Los

Angeles, [19515] California, State of California, as per map recorded in Book 10, Page 109 of Maps, in the office of the County Recorder of said County.

That L. E. McCleary is the record owner of said real property subject to the said deed of trust.

IV.

That under the terms of said note monthly installments of Twenty-five ($25.00) Dollars including principal and interest at the rate of six per cent (6%) per annum, were to be made on the first day of each month; that no payments have been made since April 4, 1946. That there is a principal balance of Six Hundred Thirty-one and 78/100ths ($631.78) Dollars which is due, owing and unpaid, as of April 4, 1946. That interest thereon to April 1, 1950, amounts to the sum of ..... That the combined amount of said principal and interest is..... That L. E. McCleary, as assuming trustor, has made no payments of either principal or interest since April 4, 1946, and has been since said date, and is now, in default thereof.

V.

That intervenor has the right to receive the balance of the principal due under said note, plus interest, or in lieu thereof, she has the right to foreclose said deed of trust and to direct said trustee to exercise the power of sale contained in said deed of trust because of said defaults thereunder.

VI.

That on or about May 20, 1946, defendant, A. V. Ammann, assumed the office of conservator of the Long Beach Federal Savings and Loan Association, and thereafter a controversy arose between the said conservator and Long Beach Federal Savings and Loan Association, and various other parties to these actions as to the authority of said conservator to transfer, assign, or otherwise deal with deeds of trust outstanding in the name of Long [19516] Beach Federal Savings and Loan Association and all other assets of said association; that because of the various contentions and allegations of the parties to these actions, title insurance companies are unwilling to insure the validity of intervenor's ownership or title to said note and deed of trust, and the trustee, defendant Title Service Company, declines to invoke the power of sale provision in said deed of trust, and foreclose the same, unless ordered and directed so to do by this Court. That apparently various prior orders of the Court freeing the titles of other customers of said Long Beach Association did not contain descriptions of, or reference to, the said note and trust deed herein described and owned by intervenor.

VII.

That the sale of said property under the power of sale provision in said deed of trust, if authorized by this Court, could be made without prejudice to the rights of litigants in this action and in such manner as not to, in any way, affect the issues involved in this litigation.

VIII.

That by reason of the fact that said power of sale provision cannot be exercised, intervenor is suffering great and irreparable and continuing loss; that intervenor has a right to intervene under Rule 24(a) of the Federal Rules of Civil Procedure on the ground that she is so situated as to be adversely affected by distribution or other disposition of property which is in the custody or subject to the control or disposition of this Court or an officer thereof.

IX.

That the only way in which intervenor can prevent her irreparable and continuing loss, and secure a complete and effective remedy is to be permitted by this Honorable Court to intervene in the above-entitled proceeding for the purpose of [19517] obtaining an order of this Court directing the said trustee under said deed of trust to exercise the power of sale contained therein.

X.

That intervenor is in danger of being barred by the running of the Statute of Limitations on said note and deed of trust. That this Honorable Court has the custody of said hereinabove described real property or said property is subject to the control or distribution of this court and therefore it is the only court with power to grant the relief sought by intervenor herein.

XI.

That unless relief be granted by this Honorable Court, intervenor will suffer grave and irreparable

damage and will be unable to satisfy the obligation due her under said note and deed of trust and that such damage will continue to mount and increase during whatever period of time must elapse before the final determination of said litigation among the parties in the above-entitled proceeding.

Wherefore, intervenor prays that she have judgment as follows:

1. That this Court direct the trustee, Title Service Company, of the trust deed hereinabove described to exercise the power of sale contained in said deed of trust.

2. That in aid hereof the Court issue an order directed to the parties in interest requiring them to perform hereunder.

3. That this intervenor have such other and further relief as to the Court may seem proper.

/s/ FRANK G. MAKEPEACE,
Atty. for Intervenor Lillian
A. Coggswell. [19518]

State of California,
County of Los Angeles—ss.

Lillian A. Coggswell being by me first duly sworn, deposes and says: that she is the Internor in the above-entitled action; that she has read the foregoing Complaint in Intervention and knows the contents thereof; and that the same is true of her own knowledge, except as to the matters which are

therein stated upon her information or belief, and as to those matters she believes it to be true.

/s/ LILLIAN A. COGGSWELL.

Subscribed and sworn to before me this 31st day of March, 1950.

[Seal] /s/ FRANK G. MAKEPEACE,
Notary Public in and for Said County and State of California.

Lodged April 13, 1950.

[Endorsed]: Filed June 5, 1950.

[Title of District Court and Cause.]

LILLIAN A. COGGSWELL,
Applicant for Intervention.

AFFIDAVIT IN SUPPORT OF MOTION TO INTERVENE

State of California,
County of Los Angeles—ss.

Lillian A. Coggswell, being first duly sworn, deposes and says:

That she is the Applicant for intervention in the [19520] above-entitled action; that she is the purchaser and assignee of a note and deed of trust upon the following described real property:

Lots 45 and 46 of Signal Park Tract; No. 2, in the City of Long Beach, County of Los

Angeles, State of California, as per Map recorded in Book 10, Page 109 of Maps in the Office of the County Recorder of said County.

That defendant, Long Beach Federal Savings and Loan Association was the original beneficiary under that certain deed of trust executed by Frank E. Russell dated October 1, 1943, and recorded October 11, 1943, in Book 20322, Page 207 of Official Records, County of Los Angeles, California, securing a certain promissory note of even date executed in the face amount of Twelve Hundred ($1200.00) Dollars and assumed by L. E. McCleary, upon which note there is an unpaid balance of Six Hundred Thirty-one Dollars and Seventy-eight ($631.78) as of April 4, 1946.

That for a valid and adequate consideration paid by Intervenor to defendant, A. V. Ammann, the said Ammann caused an instrument of assignment to be executed in his name as Conservator for the defendant, Long Beach Federal Savings and Loan Association on the 11th day of October, 1946, in favor of Applicant as assignee and transferee thereof. That defendant, Title Service Company, a corporation, is the trustee under said deed of trust.

That the above-described real property is security for the payment of said trust deed note.

That Applicant desires and has the right under Rule 24(a) of the Federal Rules of Civil Procedure to intervene in this action because she is so situated as to be adversely affected by a distribution or other disposition of said property which is in the custody or subject to the control or disposition of this Court.

That because of the litigation in the above-entitled actions now pending in this Court arising over the seizure and [19521] return of possession of the said Long Beach Federal Savings and Loan Association, Applicant is unable to perfect her rights under said deed of trust and as a result thereof her rights are in jeopardy and she will suffer irreparable loss.

That this Court's Order allowing such intervention and the protection of Applicant's rights will in no way prejudice the rights of the litigants in this action nor will it in any way affect the issues involved in the pending litigation among the parties.

/s/ LILLIAN A. COGGSWELL,
Applicant for Intervention.

Subscribed and sworn to before me this 31st day of March, 1950.

[Seal] /s/ FRANK G. MAKEPEACE,
Notary Public in and
For Said County and State.

[Endorsed]: Filed April 13, 1950.

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING OF CROSS-INTERROGATORIES

Upon Reading the Application of the Plaintiffs (5421-P.H.) Shareholder Members Protective Committee of the Long Beach Federal Savings and Loan Association, the cross-claimant and third-party

plaintiff Long Beach Federal Savings and Loan Association, the cross-claimant in interpleader, Robert H. Wallis, the cross-claimant in interpleader, Title Service Company, the plaintiff (5678-P.H.) and cross-claimant (5678-P.H.) Federal Home Loan Bank of Los Angeles, et al., and the plaintiff (5678-P.H.) First Federal Savings and Loan Association of Wilmington, for extension of time for the filing of [19534] proposed cross-interrogatories to be propounded to defendant John H. Fahey, and it appearing that the parties in preparation of their cross-interrogatories may desire to incorporate therein, documents or copies thereof, obtained by the parties through the inspection of the boks, records and documents of said defendant and cross-defendant San Francisco Bank, which said inspection of said books, records and documents has been previously ordered by this Court, but has not yet been completed, and is now being conducted under the supervision of the Special Master of this Court, and, Good Cause Appearing Therefor,

It Is Hereby Ordered, that the time for the filing by any party of proposed cross-interrogatories to be propounded to the defendant John H. Fahey, upon the direct interrogatories heretofore submitted, be and the same is hereby extended until 30 days after the approval by this Court of the report of the Special Master of this Court that the inspection of said books, records and documents of the defendant, Federal Home Loan Bank of San Francisco has been completed, or until further order of the Court fixing a day certain, upon motion.

It Is Further Ordered, that the time of settlement of said proposed interrogatories and to be proposed cross-interrogatories is hereby extended to a time to be fixed hereafter by the Court.

Dated this 14th day of April, 1950.

/s/ PEIRSON M. HALL,
Judge of the United States
District Court.

[Endorsed]: Filed April 14, 1950. [19535]

At a stated term, to wit: The February Term. A. D. 1950, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Friday the 14th day of April in the year of our Lord one thousand nine hundred and fifty.

Present: The Honorable Peirson M. Hall,
District Judge

[Title of Cause.]

Wyckoff Westover, Esq., appearing as counsel for plaintiffs and Shareholders' Protective Committee, now comes before the Court and files application for extension of time for filing proposed cross-interrogatories for F. H. Fahey.

W. I. Gilbert, Jr., Esq., is present as counsel for the First Federal Savings & Loan Assoc. of Wil-

mington; Raymond Tremaine, Esq., is present as counsel for defendant Robert H. Wallis; John Whyte, Esq., is present as counsel for Federal Home Loan Bank of Los Angeles; Irving Bishop, Esq., is present as counsel for defendants Federal Home Loan Bank of San Francisco; Arline Martin, Ass't U. S. Att'y, is present as counsel for Federal Home Loan Bank Board, John H. Fahey, and A. V. Ammann; and Ronald Walker, Special Master, being present;

It is ordered that the order made on March 31, 1950, setting this cause for hearing on April 15, 1950, re settlement of interrogatories and cross-interrogatories for John H. Fahey is vacated, and Court now orders the said matter continued until thirty days after approval by the Special Master on inspection of books, etc., or until further order of the Court fixing a day certain upon motion.

Written order extending time to file cross-interrogatories is filed. [19536]

[Title of District Court and Cause.]

STATEMENT OF REASONS IN OPPOSITION TO MOTION OF LILLIAN A. COGGSWELL FOR LEAVE TO INTERVENE

The Home Loan Bank Board, an agency of the executive branch of the Government of the United States, William K. Divers, Chairman, J. Alston Adams and O. K. LaRoque, Members, of the Home Loan Bank Board, Federal Savings and Loan In-

surance Corporation, a corporate instrumentality of the United States wholly owned by the United States, and John H. Fahey, A. V. Ammann and George K. Bramley, without waiving their objections to the jurisdiction of this Court over their respective persons and their other objections including objections to the jurisdiction and to venue, but specifically reserving and asserting the same, file this Statement of Reasons in Opposition to the Motion of Lillian A. Coggswell for Leave to Intervene. [19563]

The above motion should be denied for the following reasons:

A. This Court lacks jurisdiction in the actions in which Lillian A. Coggswell seeks to intervene in that;

(1) The members of the Home Loan Bank Board are indispensable parties;

(2) The former and present members of the Home Loan Bank Board have not and cannot be duly sued or served because:

(a) they are not residents of California and have never been served in California;

(b) they may not be sued or served as non-resident defendants under 28 U.S.C. 1655, because the suits are not actions to enforce or remove liens, etc., on property located within the State of California, and the relief prayed for cannot be granted save by a decree in personam against them, which is not authorized by 28 U.S.C. 1655;

(c) they cannot be sued or served under 28 U.S.C. 1335 and 2361; because none of the complaints, cross-claims, interpleaders, bills and other pleadings are civil actions of, or in the nature of, interpleader; because none of the present and former members are "claimants" to any of the money or property in controversy, within the meaning of 28 U.S.C. 1335 and 2361; and because the claims, if any, of the present and former members are asserted in their official capacity only, and are thus claims of the United States, which has not consented to be sued thereon;

(d) they have never made a general appearance or otherwise submitted to the jurisdiction of this Court over their persons; [19564]

(3) Neither the alleged Federal Home Loan Bank of Los Angeles nor its shareholders have any justiciable interest sufficient to maintain suit here;

(4) The actions are unconsented suits against the United States;

(5) The actions are collateral attacks on administrative orders;

(6) The matters involved in the administrative orders are within the exclusive, primary jurisdiction of the Board and the parties allegedly aggrieved by said orders have failed to exhaust their administrative remedies;

(7) The Federal Savings and Loan Insurance Corporation has not and cannot be duly sued or served because:

(a) it has never been served in California;

(b) it is not a California Corporation, does not do business in California, and does not maintain in California an agent upon whom service can be made;

(c) it cannot be sued or served as a non-resident defendant under 28 U.S.C. 1655, or under 1335 and 2361, for the reasons specified in (2)(b) and (2)(c) above;

(8) None of the pleadings filed in the cause state any claim upon which any relief can be granted;

(9) The cause of action of the plaintiff-shareholders of the Long Beach Federal Savings and Loan Association fails to meet the requirements of Rule 23(b)(2) of the F.R.C.P.;

B. The motion to intervene is not sufficient because:

(1) The motion and the supporting papers disclose that it is not timely, within the requirement of Rule 24, F.R.C.P.; [19565]

(2) The moving party has an adequate remedy at law by means of a suit to foreclose under Section 725a of the California Code of Civil Procedure in the courts of the State of California;

(3) The property involved is not in the custody or subject to the control or disposition of this Court;

(4) The motion and supporting papers fail to disclose sufficient grounds for intervention;

(5) Intervention would unduly complicate and delay the main proceeding.

ERNEST A. TOLIN,
United States Attorney.

CLYDE C. DOWNING,
Assistant U. S. Attorney,
Chief of Civil Division.

PAUL FITTING,
Assistant U. S. Attorney,

By /s/ PAUL FITTING,
Attorneys for Defendants, Home Loan Bank Board, Federal Savings & Loan Ins. Corp., Wm. K. Divers, J. Alston Adams, O. K. LaRoque, John H. Fahey, A. V. Ammann and George K. Bramley.

Joinder

The Federal Home Loan Bank of San Francisco hereby joins in and adopts as its own the foregoing "Statement of Reasons in Opposition to Motion of Lillian A. Coggswell for Leave to Intervene," and the attached "Memorandum of Points and Authorities," the same in all respects as if it had served

and filed the aforesaid Statement and Memorandum on its own behalf.

VERNE DUSENBERY,

PHILIP H. ANGELL,

BISHOP & HOFFMAN,

By /s/ IRVING G. BISHOP,

Counsel for the Federal Home Loan Bank of San Francisco.

[Endorsed]: Filed April 26, 1950. [19566]

[Title of District Court and Cause.]

ORDER STAYING PAYMENT OF ATTORNEYS' FEES AND FIXING AMOUNT OF SUPERSEDEAS BOND

Upon the motion of defendant, cross-defendant and third party defendant Federal Home Loan Bank of San Francisco, and good cause therefor appearing;

It Is Hereby Ordered that the payment of attorneys' fees to Messrs. O'Melveny & Myers and Richard Fitzpatrick, Esq. and to W. I. Gilbert, Jr. Esq., or any of them, from the funds, assets or securities deposited in the Registry of this Court pursuant to the "Order Requiring Deposit of Certain Notes, Deeds of Trust, U. S. Government Bonds and Other Collateral Held by the Federal Home [19633] Loan Bank of San Francisco," dated March 13, 1948, or from any proceeds thereof, or from any funds,

assets, or securities on deposit in the Registry of this Court or from any funds, or in any manner whatsoever, in accordance with the oral decision of this Court made in open court on April 8, 1950, or in accordance with any formal written order entered pursuant thereto, is hereby stayed until the expiration of ten days from and after the entry of such formal written order or judgment of this Court for payment of such attorneys' fees.

It Is Further Hereby Ordered that the amount of the supersedeas bond to be filed by said Federal Home Loan Bank of San Francisco in conjunction with an appeal from the formal written order and judgment of this court for the payment of such attorneys' fees is hereby fixed in the amount of $.....

Dated: This ..... day of May, 1950.

.....,
U. S. District Judge.

[Lodged]: May 22, 1950. [19634]

[Title of District Court and Causes.]

No. 5421 and 5678-PH

REQUEST FOR HEARING OF EX PARTE MATTER

To the Clerk of the Above-Entitled Court:

The United States of America by the United States Attorney requests that the matter listed below be placed on the Court's ex parte calendar for hearing on May 22, 1950 at 10:00 a.m., on Motion for Order Staying Payment of Attorneys' Fees and Fixing Amount of Supersedeas Bond.

Dated: Los Angeles, California, May 22, 1950.

UNITED STATES ATTORNEY,

By /s/ PAUL FITTING,
Assistant U. S. Attorney,
Attorneys for Plaintiff.

[Endorsed]: Filed May 22, 1950. [19635]

At a stated term, to wit: The February Term A. D. 1950, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday the 22nd day of May in the year of our Lord one thousand nine hundred and fifty.

Present: The Honorable Peirson M. Hall,
District Judge

[Title of Causes.]

This cause now coming before the Court; Sylvester Hoffman and Phillip Angel, Esqs., appearing as counsel for defendant San Francisco Bank; Paul Fitting, Ass't U. S. Att'y, appearing as counsel for official defendants;

Request by official defendants for ex parte hearing is filed;

Motion of San Francisco Bank for order staying payment of attorneys' fees and fixing amount of supersedeas bond is filed; and proposed order thereon is lodged. Court refuses to grant the said motion at this time. [19636]

[Title of District Court and Cause.]

OBJECTIONS TO PROPOSED "FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER RE ALLOWANCE OF ATTORNEYS' FEES ON ACCOUNT"

The Home Loan Bank Board, an agency of the executive branch of the Government of the United States, William K. Divers, Chairman, J. Alston Adams and O. K. LaRoque, Members of the Home Loan Bank Board, the Federal Savings and Loan Insurance Corporation, a corporate instrumentality of the United States wholly owned by the United States, and John H. Fahey, A. V. Ammann and George K. Bramley, without waiving the objections set forth in their "Memorandum in Opposition to Motions for Order Directing Payment of Attorneys' Fees on Account, and Repayment [19645] of Moneys Advanced, and the Supplements Thereto," filed herein on September 23, 1949, and in their "Memorandum in Opposition to Motions by Plaintiffs for Orders Directing Payment of Attorneys' Fees on Account and Costs," filed herein on February 23, 1950, and without waiving their objections to the jurisdiction of this Court over their respective persons and their other objections including objections to the jurisdiction and to venue, but specifically reserving and asserting the same, file under Rule 7(a) of this Court this written detailed statement of objections, together with the reasons therefor, to the proposed "Findings of Fact, Conclusions of Law, and Order Re Allowance of Attorneys' Fees

on Account" served by mail upon counsel for these parties by W. I. Gilbert, Jr., Richard Fitzpatrick, and O'Melveny & Myers, on Saturday, May 20, 1950. This statement of objections, and the reasons therefor, is not a consent by these defendants to the form or substance of any part or all of the proposed "Findings of Fact, Conclusions of Law, and Order Re Allowance of Attorneys' Fees on Account" in any respects not covered by this statement.

The proposed form of order provides on page 19 (lines 4 through 7) "* * * that the clerk of this court be, and he hereby is, directed and required to pay forthwith, out of funds and moneys heretofore deposited and now on deposit in the Registry of the court * * *" the fees awarded.

I.

The proposed order is objectionable in that it contains no stay pending appeal. These defendants are entitled to a stay of payment of the interim fees during the pendency of an appeal and it is the intention of these defendants to take such an appeal. Pending an appeal, the status quo should be preserved.

II.

If this Court is not inclined to include in the order a stay pending appeal, because it feels that application for a stay cannot be made until the order is signed, or for any other reason, these defendants are entitled to a full and fair opportu-

nity to seek to obtain a stay of such payment pending appeal, or equivalent relief, from any courts having the power to grant it, and these defendants intend to seek such a stay or equivalent relief. The order as presently drafted denies them this opportunity. [19646]

(a) The order should at least provide that no payment be made until the expiration of the ten-day period provided by Rule 62(a). The proposed provision above quoted creates confusion and uncertainty, conflicts with Rule 62(a), and makes it possible that the fees will be paid out pursuant to the order of the Court immediately on signing the order, and in disregard of Rule 62(a).

(b) If this Court feels that Rule 62(a) is not applicable to this order, these defendants are nevertheless entitled to equivalent protection in the order. These defendants are entitled to have the payment of the money stayed long enough to permit them to speedily apply to this Court for a permanent stay of execution, or equivalent relief, or to any other Court having the power to grant such relief, if necessary. Time is also necessary to perfect an appeal from the signed order, which appeal may be considered a prerequisite to the granting of any stay.

(c) Protection should be afforded to these defendants by the requirement that bond be posted by any one collecting the fees awarded, conditioned

upon repayment of the fees if it is ultimately determined that the fees are improper.

Respectfully submitted,

ERNEST A. TOLIN,
United States Attorney,

CLYDE C. DOWNING,
Assistant United States Attorney, Chief of Civil Division,

PAUL FITTING,
Assistant United States Attorney,

By /s/ PAUL FITTING,
Attorneys for Home Loan Bank Board, William K. Divers, Chairman; J. Alston Adams, Member, and O. K. LaRoque, Member, of the Home Loan Bank Board, the Federal Savings and Loan Insurance Corporation, John H. Fahey, A. V. Ammann and George K. Bramley.

[Endorsed]: Filed May 24, 1950. [19647]

Title of District Court and Cause.]

DISAPPROVAL AND OBJECTIONS OF FEDERAL HOME LOAN BANK OF SAN FRANCISCO AS TO FORM OF PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER RE: ALLOWANCE OF ATTORNEYS' FEES ON ACCOUNT

Comes now Federal Home Loan Bank of San Francisco (hereinafter, for brevity, referred to as "San Francisco Bank"), defendant in Civil Action No. 5678-PH (WM), and cross-defendant and third party defendant in Civil Action No. 5421-PH, and without waiving any of its objections heretofore made in either of [19651] said actions as to venue or jurisdiction of the Court over the person of this defendant or the subject matter of said actions, or either thereof, but specifically reserving and asserting the same, and without waiving the objections set forth in the "Opposition of Federal Home Loan Bank of San Francisco to Plaintiffs' Motion and Supplemental Motion for an Order Fixing Attorneys' Fees and Directing Payment Thereof" dated September 7th, 1949, and duly filed herein, the "Answer and Opposition of Federal Home Loan Bank of San Francisco to the Motion and Order of First Federal Savings and Loan Association of Wilmington, dated February 10th, 1950" dated February 23rd, 1950, and duly filed herein, or any or all of the other objections heretofore made to the granting of any of the relief prayed for in or by any of the motions more specifically referred to in

the proposed "Findings of Fact, Conclusions of Law and Order Re Allowance of Attorneys' Fees on Account" served by mail upon only one of counsel for San Francisco Bank at 9:00 a.m. on Saturday, May 20th, 1950, but specifically reserving and asserting the same, and without waiving any of its objections that the proposed Findings of Fact are not supported by or are contrary to the evidence, are beyond or not within the issues before the Court, or are against law, or any other objections thereto, and without waiving any of its objections that the proposed Conclusions of Law are not supported by or are contrary to the evidence and the Findings of Fact, or are against law, or any other objections thereto, Disapproves the form of the proposed "Order re Allowance of Attorneys' Fees on Account" for payment of attorneys' fees to Messrs. O'Melveny & Myers and Richard Fitzpatrick, Esq., and to W. I. Gilbert, Jr., Esq., and Objects to the Form of said proposed order upon the following grounds:

1. That said proposed order, by its terms, directs the Clerk to pay said attorneys' fees forthwith out of funds and [19652] moneys heretofore deposited and on deposit in the Registry of the Court, and that such provisions for payment "forthwith" would deprive San Francisco Bank of the benefits of its right to appeal therefrom, and is contrary to law, in that:

(a) San Francisco Bank is entitled to the protection and benefits of the automatic stay of 10

days as provided by Rule 62(a) of the Federal Rules of Civil Procedure;

(b) In the event Rule 62(a) is held by this Court to be inapplicable to the instant proceeding or that the aforesaid automatic stay is deemed inapplicable to the terms or conditions of the proposed order, or otherwise inapplicable, San Francisco Bank is entitled to a reasonable opportunity after entry of an order for payment of said attorneys' fees and prior to payment thereof within which to present to this Court a timely motion for stay of any such order within which to perfect an appeal therefrom, and within which to apply, if necessary, to any other court for a stay during the pendency of an appeal;

(c) Although application for a stay in the payment of such attorneys' fees for a period of ten days from and after the entry of an order for such payment was presented to this Honorable Court on May 22nd, 1950, in open court, the Court has declined to act thereon upon the ground that said application was prematurely made.

2. That said proposed order does not provide for a stay of proceedings for its enforcement or a stay as to the payment of said attorneys' fees for 10 days after its entry, or for a permanent stay pending an appeal, which objection is made [19653] upon each and all of the foregoing specifications as to the foregoing objection "1."

3. That said proposed order, being an interim final order in a purported proceeding in equity, is

inequitable and unfair in that it fails to provide for a stay of payment of such attorneys' fees ending an appeal, or conditioned upon perfecting such appeal, or at all, notice of intention to appeal from any order allowing such attorneys' fees having been given by San Francisco Bank in open court at the conclusion of the hearings upon said motions, or in the alternative that said proposed order fails to require the giving of adequate or any bond, undertaking or security by the payees named in said proposed order, conditioned upon repayment in the event such order for payment is modified, vacated or set aside or reversed. That in the absence of a provision for stay or requirement of security contained in such order for payment, San Francisco Bank is or may be inequitably and unlawfully deprived of the benefits of its right of appeal.

4. That the proposed order does not designate with particularity from which specific funds or deposits in the Registry of the Court said fees or any part thereof are to be paid by the Clerk of this Court. The funds, notes, bonds and securities presently held in the Registry of the Court were received from various sources, all pursuant to numerous purported interpleaders, interventions and orders for deposit or impound, and there are no general funds in the Registry of the Court available for the payment of the proposed allowances. Consequently, if the order directs payment from funds or deposits in the Registry of this Court, it should specifically direct the Clerk to make payment only

from specifically designated funds or deposits therein. [19654]

5. That the proposed order fails to designate specifically the funds or deposits in the Registry of this Court and is so vague and uncertain as to the particular funds or deposits therein from which the Clerk is directed to make payment of said attorneys' fees, that the same could be paid from the notes, funds, assets or securities deposited in said Registry by San Francisco Bank pursuant to the "Order Requiring Deposit of Certain Notes, Deeds of Trust, U. S. Government Bonds and Other Collateral Held by the Federal Home Loan Bank of S. F." dated March 13th, 1948, or from substituted collateral thereafter deposited in said Registry, which such payment would result in the irreparable prejudice and injury of San Francisco Bank. Said notes, funds, assets or securities so deposited by San Francisco Bank consist of notes in the aggregate principal sum of $6,300,000 in favor of San Francisco Bank, as payee, and collateral securing the same, together with certain funds thereafter deposited as substitute collateral. As to said notes and collateral various claims are asserted in these consolidated actions as follows:

(a) San Francisco Bank claims and asserts that said notes are its property and that it is entitled to hold and have maintained the collateral securing the same in an amount adequately sufficient to secure payment thereof and the accruing interest thereon, until fully paid;

(b) Plaintiffs in action No. 5421-PH and Long

Beach Federal Savings and Loan Association, as a party thereto, claim and assert that said notes create no valid obligations as to said Association and that said Association is entitled to all of said collateral without payment of the debts or obligations evidenced by said notes. [19655]

(c) Plaintiffs in action No. 5678-PH claim and assert that said notes and collateral securing the same are the property of Federal Home Loan Bank of Los Angeles.

The respective aforesaid claims concerning said notes and collateral cannot be adjudicated until there has been a trial of said actions on the merits and no such trial has been had. To direct the payment of attorneys' fees in the manner of the proposed order would constitute a determination of said respective claims upon the merits prior to a trial thereon to the prejudice of and irreparable injury to San Francisco Bank and would be tantamount to a personal judgment against San Francisco Bank and a levy of execution thereon, and would constitute the taking of property of San Francisco Bank without trial, arbitrarily, and without due process of law, would be against and contrary to law, and beyond the power or jurisdiction of this Court.

6. That the condition of said proposed order providing that no part of said attorneys' fees shall be assessed ultimately against Long Beach Federal Savings and Loan Association or its assets and relieving said Association from the obligation to re-

plenish any deficiency in collateral arising by reason of said proposed order or the payment of said attorneys' fees in accordance therewith, constitutes a determination on the merits of the respective claims of San Francisco Bank and said Association with respect to said notes and collateral, without a trial, and is contrary to law, premature, beyond the power or jurisdiction of this Court and outside the issues of said motions for allowance of attorneys' fees, and such condition would deprive San Francisco Bank of its property without due process of law to its irreparable injury. [19656]

7. That said proposed order is equivocal and not capable of enforcement for the reason that in the event that the claims of the aforesaid Association with respect to the notes deposited in accordance with the aforesaid order dated March 13th, 1948, and the collateral securing the same are upheld upon a trial on the merits, then there is no property or assets now in the Registry of this Court, other than that claimed by or belonging to said Association, and in such event the condition of said proposed order could not be met.

8. That there are no funds or deposits in the Registry of this Court claimed by or on behalf of said Federal Home Loan Bank of Los Angeles, directly or indirectly, except funds and deposits claimed by San Francisco Bank to be its property; and as to these there has been and can be no adjudication, prior to a trial on the merits, that such funds and deposits are directly or indirectly the

property of plaintiffs in action No. 5678-PH, or any of them, as against which an award of attorneys' fees can be made in a purported class action, or within the issues as pleaded in said action; any such order for payment of said attorneys' fees out of funds or deposits in the Registry of this Court would be tantamount to a determination of the merits of said action No. 5678-PH, without trial, and would constitute a premature, prejudicial, arbitrary and unlawful deprivation of property of San Francisco Bank without due process of law, to its irreparable injury.

9. That there are no funds on deposit in the Registry of this Court that are available for payment of the attorneys' fees which are the subject of the proposed order in accordance with and under the terms and conditions of said proposed order.

The foregoing Objections are made and based upon the Rules of the United States District Court for the Southern District [19657] of California, as amended, and particularly Rule 7(a) thereof, upon Rules 6(a), 6(e), 62(a), 62(d) and 62(g), Federal Rules of Civil Procedure, upon the files, records, pleadings and proceedings in the aforesaid actions and each and both of them, upon the files, records and books of the Clerk of this Court, showing or making reference to the funds, notes, securities and other property heretofore deposited in or withdrawn from the Registry of this Court, including funds, notes, securities and other property substituted therefor, upon the written "Motion for Order Staying Payment of Attorneys' Fees and Fixing

Amount of Supersedeas Bond" presented, made and filed with this Court by San Francisco Bank, ex parte, in open court, on May 22nd, 1950, and upon the Order thereon as proposed by San Fran*cisco and* at said time filed with this Court.

Dated: May 24th, 1950.

VERNE DUSENBERY,

PHILIP H. ANGELL,

IRVING G. BISHOP,

SYLVESTER HOFFMAN,

By /s/ SYLVESTER HOFFMAN,

Attorneys for Federal Home Loan Bank of San Francisco.

[Endorsed]: Filed May 24, 1950. [19658]

[Title of District Court and Cause.]

PROPOSED AMENDMENTS, ADDITIONS AND/OR DELETIONS TO FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER RE ALLOWANCE OF ATTORNEYS' FEES ON ACCOUNT, PROPOSED BY PREVAILING PARTIES IN MOTIONS FOR ATTORNEYS' FEES HERETOFORE LODGED MAY 19, 1950

I.

The the language in paragraph 5, page 4, line 22, starting with the words "That the cross-claim of Federal Home Loan Bank of Los Angeles," etc.,

to and including the words "grounds" on line 2 of page 5, be amended to read as follows:

"That the cross-claims of all parties to said consolidated actions, including but not limited to Federal Home Loan Bank of Los Angeles, were filed, and at all times since, have been and now are, being prosecuted and maintained in good faith and on reasonable grounds. That all other pleadings filed and appearances made, by any or all of said plaintiffs, third-party plaintiffs and cross-claimants, in either or both said consolidated actions Nos. 5678-P.H. and 5421-P.H., were filed and made, and all proceedings had, in each of said actions on the part of any or all of said parties, have been carried on and are now being carried on by said parties through their respective counsel of record, in good faith and on reasonable grounds."

II.

That the language in paragraph 12, page 9, lines 19 to 21 inclusive, starting with the words "That said letter" and ending with the words "settlement negotiations," be amended to read as follows:

"That said letter was dated April 27, 1949, and was written by Attorney Peyton Ford, Assistant to the Attorney General of the United States, as attorney for the above-listed Defendants in connection with the request that counsel for the plaintiffs, Mallonee, et al., and counsel for the [19677] Long Beach Federal Savings and Loan Association, and counsel for the Title Service Company and counsel for Robert H. Wallis, stipulate and agree that the

Court's announced order fixing an amount of approximately $540,000.00 as an allowance on account of attorneys' fees on account of services rendered, be vacated and set aside and that a new and different allowance on account in the amount of only approximately one-third thereof be ordered entered at said time.

That a true and correct copy of said letter was ordered filed in the within proceedings by Order of this Court duly made and entered May 10, 1949. That this Court and the parties and all of them, relied upon said letter of said Attorney Peyton Ford, Assistant to the Attorney General of the United States, dated April 27, 1949, and that said letter and the stipulations made in reliance thereupon, submitted all of said parties so stipulating to the jurisdiction of this Court for the determination of all of such matters of attorneys' fees to be subsequently judicially determined in adversary proceedings by this Court.

That in reliance upon said representations in the said letter dated April 27, 1949, and signed by Attorney Peyton Ford, Assistant to the Attorney General of the United States, as attorney for Defendants Home Loan Bank Board, William K. Divers, J. Alston Adams, O. K. LaRoque, John H. Fahey, A. V. Ammann, and Federal Savings and Loan Insurance Corporation, the said parties did so stipulate to the vacating of said priorly announced attorneys' fee [19678] order, and in reliance thereon this Court did make and duly enter its Findings of Fact, Conclusions of Law and Or-

der for Interim Allowances on Account of Attorneys' Fees, prior to December 15, 1948, which Order was duly made and entered May 10, 1949, and which said Order and Judgment has now become final.

That pursuant to the submission to the jurisdiction of this Court, contained in said letter of April 27, 1949, of the said Attorney Peyton Ford, Assistant to the Attorney General of the United States, and in compliance with the terms and provisions of the Order for Interim Allowances on Account of Attorneys' Fees incurred prior to December 15, 1948, filed herein on May 10, 1949, and which Order has now, by the lapse of time, become a final Order of this Court, any and all further attorneys' fees for any and all of the parties litigant herein shall be judicially determined in adversary proceedings.

The request for refunds of costs, expenses and/or attorney fees heretofore paid or advanced outside of, and without order of this Court, by the defendants and cross-defendants Federal Home Loan Bank of San Francisco, and its officers and directors, is not considered a necessary part of this Order allowing interim attorneys' fees on account, to counsel for Plaintiffs in Consolidated Action 5678-(WM)-P.H., and is therefore, placed off calendar and not now decided. [19679]

III.

That the language in sub-paragraph (f) of paragraph 3, page 15, line 4, starting with the words "The sum of $36,485.25 deposited in the," be amended to read as follows:

"The sum of $55,485.25 deposited in the"

IV.

That the language in paragraph 8, page 17, lines 9 to 14, starting with the words "That the matters," and ending with the words "of law and of fact," be amended to read as follows:

"That the matters and persons concerned in this litigation and in Home Loan Bank Board Order No. 2015 and in proceedings which might be had thereunder, are overlapping, coincidental and mutually inter-related. The decision of one or more of the issues in either likewise involves a decision of one or more of the issues in both said Order No. 2015 and this litigation. This litigation and any proceedings which might be had under said Order No. 2015 involve the determination of common questions of law and of fact."

V.

That the language in paragraph 10, page 17, line 24, starting with the words "includes jurisdiction to decide any and all issued in these," be amended to read as follows:

"includes jurisdiction to decide any and all issues in these."

VI.

That the language on page 19, lines 15 to page 20, line 1, starting with the words "It is a condition," and ending with the [19680] words "be meet and just," be amended to read as follows:

"The Court hereby specifically reserves power and jurisdiction to hear and determine in adversary proceedings or otherwise, any and all petitions and

motions for determination, fixing, allowance, allocation, assessment, or apportionment, of attorneys' fees, costs, and/or expenses, for or against any or all of the parties as in its discretion it may deem advisable or appropriate; except it is further ordered, that the amounts ordered hereby paid generally from the funds in the Registry of the Court are not by the terms of this Order, imposed, allocated or assessed upon or against any specific party or parties, fund or funds, provided however, that it is hereby determined and ordered that the amounts herein allowed and ordered paid from said funds shall never be allocated against or impose any part of the same against or upon funds or assets owned by or belonging to the Long Beach Federal Savings and Loan Association, or any of its shareholders, members, or stockholders, either individually, nor as an association."

VII.

That there be inserted on page 20, line 10, following the words "the judgment contained herein," on line 9, an additional paragraph reading as follows:

"All matters and items not expressly herein allowed, disallowed or otherwise passed upon, are continued submitted, pending the further order and determination of this Court." [19681]

Dated this 1st day of June, 1950.

WESTOVER & SMITH,

By /s/ WYCKOFF WESTOVER,

Attorneys for Plaintiffs Mallonee, et al., in Action No. 5421-P.H.

/s/ CHARLES K. CHAPMAN,

Attorney for cross-claimant and third-party plaintiff Long Beach Federal Savings and Loan Association.

[Endorsed]: Filed June 1, 1950. [19682]

[Title of District Court and Cause.]

DISAPPROVAL AND OBJECTIONS OF FEDERAL HOME LOAN BANK OF SAN FRANCISCO TO PROPOSED AMENDMENTS, ADDITIONS AND/OR DELETIONS TO FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER RE ALLOWANCE OF ATTORNEYS' FEES ON ACCOUNT PROPOSED BY PREVAILING PARTIES ON MOTION FOR ATTORNEYS' FEES HERETOFORE LODGED MAY 19, 1950, FILED ON BEHALF OF PLAINTIFFS MALLONEE, ET AL., AND LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION.

Comes Now Federal Home Loan Bank of San Francisco (hereinafter for brevity referred to as

San Francisco Bank), defendant [19689] in Civil Action 5678-PH (W.M.) and cross-defendant and third party defendant in Civil Action No. 5421-PH and, without waiving any of its objections heretofore made in either of said actions as to venue or jurisdiction of the Court over the person of this defendant or the subject matter of said actions, or either of them, but specifically reserving and asserting the same, and without waiving the objections heretofore made and filed in opposition to plaintiffs and each of their motions and supplemental motions for orders fixing attorneys' fees and the objections as to form of proposed findings of fact, conclusions of law and order re allowance of attroneys' fees on account heretofore filed herein, but specifically reserving and asserting the same, and without waiving any of its objections that the proposed finding of facts are not supported by or are contrary to the evidence, are beyond or not within the issues before the Court or are against law, or any other objecttions thereto, and without waiving any of its objections that the proposed conclusions of law are not supported by or are contrary to the evidence and findings of fact or are against law, or any other objections thereto, hereby objects to the Proposed Amendments, Additions and/or Deletions to Findings of Fact, Conclusions of law, and Order Re Allowance of Attorneys' Fees on Account, Proposed by Prevailing Parties in Motions for Attorneys' Fees Heretofore Lodged May 19, 1950," heretofore filed herein by and on behalf of plaintiffs Mallonee, et al., and cross-claimant and

third party plaintiff, Long Beach Federal Savings and Loan Association, copy of which was served upon one of counsel for San Francisco Bank on Friday, June 2, 1950, upon the following grounds:

1) That the proposed amendment to paragraph 5, page 4, line 22 through line 2, page 5 of said proposed finding of fact, the text of which proposed amendment is set forth on page 2 of [19690] said proposed amendment, lines 6 through 20, inclusive, purports to encompass matters beyond the issues presented by said motions for allowance of attorneys' fees and the respective objections thereto, are beyond the evidence presented upon the hearings upon said motions, are not supported by the evidence, and are against law and that such proposed amendment is not a proper finding of fact, and is extraneous to and irrelevant to the issues presented upon said motions and objections thereto;

2) That the proposed amendment of paragraph 12 of said proposed findings of fact, page 9, lines 19 through 21, inclusive, as set forth in the proposed amendments at page 2, line 27 through page 4, line 20, inclusive, are beyond the evidence presented upon the hearings upon said motions, are not supported by the evidence, and are against law and such proposed amendment is not a proper finding of fact, and is extraneous to and irrelevant to the issues presented upon said motions and objections thereto; and further that said proposed amendment is contrary to the record, the stipulations of the parties heretofore filed and made in open court in

connection with hearings upon the allowance of attorneys' fees referred to in said proposed amendment, and contrary to the express intention of the parties participating therein; and further that the record relating to proceedings for interim allowances on account of attorneys' fees prior to December 15, 1948, which culminated in the order made and entered May 10, 1949, clearly discloses that at all times said San Francisco Bank objected to the jurisdiction of the court and reserved all its objections thereto and at no time stipulated or agreed, directly or indirectly, that attorneys' fees for said San Francisco Bank should be judicially determined in adversary proceedings, and that the language of said proposed amendment contained on page 4, lines 17 through 20, inclusive, is [19691] clearly contrary to the record, evidence, findings of fact and conclusions of law in connection with said proceedings for interim allowance on account of attorneys' fees prior to December 15, 1948.

3) That the proposed amendment to the form of proposed order appearing on page 19, line 15 to page 20, line 1, as said proposed amendment is set forth on page 6, lines 2 through 22, inclusive, of said proposed amendments is objectionable and contrary to law upon the same grounds as are set forth in pargraphs 4 through 9, inclusive, of the Disapproval and Objections of San Francisco Bank heretofore filed to said proposed form of order; and further that the proposed language contained in said proposed amendment on page 6, lines 2 through 9, inclusive, purporting to reserve to the court

power and jurisdiction to hear and determine in adversary proceedings the fixing and allowance of attorneys' fees, costs or expenses for or against any or all parties to said litigation is beyond the power and jurisdiction of the court, is contrary to law, seeks to encompass matters beyond and outside the scope of the issues presented to the court upon said motions for order fixing attorneys' fees and the objections thereto, and is without support in the evidence taken on hearings upon said motions, and is not supported by said proposed findings of fact or conclusions of law or amendments thereto.

The foregoing Objections are made and based upon the Rules of the United States District Court for the Southern District of California, as amended, and particularly Rule 7 (a) thereof, upon Rules 6(a), 6(e), 62(a), 62(d) and 62(g), Federal Rules of Civil Procedure, upon the files, records, pleadings and proceedings in the aforesaid actions and each and both of them, upon the files, records and books of the Clerk of this Court, showing or [19692] making reference to the funds, notes, securities and other property heretofore deposited in or withdrawn from the Registry of this Court, including funds, notes, securities and other property substituted therefor, upon the written "Motion for Order Staying Payment of Attorneys' fees and Fixing Amount of Supersedeas Bond" presented, made and filed with this Court by San Francisco Bank, ex parte, in open Court on May 22nd, 1950, upon the Order thereon as proposed by San Francisco Bank and at

said time filed with this Court, and upon "Disapproval and Objections of Federal Home Loan Bank of San Francisco as to Form of Proposed Findings of Fact, Conclusions of Law and Order Re: Allowance of Attorneys' Fees on Account" heretofore filed herein.

Dated: June 6, 1950.

VERNE DUSENBERY,

BISHOP & HOFFMAN,

PHILIP H. ANGELL,

By /s/ PHILIP H. ANGELL,

Attorneys for Federal Home Loan Bank of San Francisco.

[Endorsed]: Filed June 8, 1950. [19693]

In the District Court of the United States for the Southern District of California, Central Division

No. 5678-PH(WM) Civil Consolidated With No. 5421-PH Civil

FEDERAL HOME LOAN BANK OF LOS ANGELES, a Body Corporate, et al.,

Plaintiffs,

vs.

FEDERAL HOME LOAN BANK OF PORTLAND, a Body Corporate, et al.,

Defendants.

PAUL MALLONEE, et al.,

Plaintiffs,

vs.

JOHN H. FAHEY, et al.,

Defendants.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER RE ALLOWANCE OF ATTORNEYS' FEES ON ACCOUNT

The motion of plaintiffs in Action No. 5678-PH(WM) for an order directing payment of attorneys' fees on account (of legal services heretofore rendered and to be rendered in the above-entitled consolidated actions and each of them by Richard Fitzpatrick, Esq. and Messrs. O'Melveny & Myers for and on behalf of said plaintiffs in said consolidated Action No. 5678-PH(WM), and for and on behalf of defendant, third-party defendant,

cross-claimant and cross-defendant Federal Home Loan Bank of Los Angeles in consolidated Action No. 5678-PH) which said motion was filed on or about January 6, 1949, and a supplement thereto was filed on or about July 8, 1949, and the motion and petition of plaintiff First Federal Savings & Loan Association of Wilmington for allowance of attorneys' fees on account (of legal services heretofore rendered in the above-entitled consolidated actions and each of them by W. I. Gilbert for and on behalf of plaintiff First Federal Savings & Loan Association of Wilmington), which said latter motion and petition was filed on or about February 10, 1950, came on duly and regularly on February 27, 1950, before the Honorable Peirson M. Hall, District Judge presiding, said moving parties and each of them and as well the following other parties and each of them, to wit:

Plaintiffs Mallonee, et al., in Civil Action No. 5421-PH.

Defendant, Third-Party Plaintiff and Cross-Claimant, Long Beach Federal Savings and Loan Association, in Civil Action No. 5421-PH.

Defendant Federal Home Loan Bank of San Francisco, in Civil Action No. 5678-PH(WM), and Third-Party Defendant and Cross-Defendant in Civil Action No. 5421-PH.

Plaintiffs other than First Federal Savings and Loan Association of Wilmington, an incorporated association, in Civil Action No. 5678-PH(WM) and [19744] Defendant, Third-Party Defendant, Cross-Claimant and Cross-

Defendant, Federal Home Loan Bank of Los Angeles, in Civil Action No. 5421-PH.

Defendant, Ammann, individually and as Conservator, in Civil Action No. 5421-PH, and John H. Fahey, individually, Defendant in Civil Action No. 5678-PH(WM), and John H. Fahey, individually and as Commissioner, Defendant and Cross-Defendant in Civil Action No. 5421-PH.

(Special appearance only.)

Plaintiff, First Federal Savings and Loan Association of Wilmington, an incorporated association, in Civil Action No. 5678-PH(WM).

Defendant and Cross-Claimant, Title Service Company, in Civil Action No. 5421-PH.

Defendant and Cross-Claimant, Robert Wallis, in Civil Action No. 5421-PH.

appearing by and through their respective counsel of record, whereupon and on said date of February 27, 1950, and on February 28, 1950, and, after continuances duly and regularly ordered by the Court, on April 7, 1950, and April 8, 1950, said motions and each of them and said petition were duly heard, evidence both oral and documentary was received, said matters and each of them were duly argued and submitted for decision; wherefore

The Court Finds

1. In all respects as declared in the Conclusions of Law hereinafter set forth.

2. That due, timely and sufficient notice of the hearings of said motions, and each of them, and of said petition, has been given. Such notice was given in all respects as specified respectively in that certain order setting for hearing said motion of plaintiffs, and each of them, in said action No. 5678-PH (WM) filed herein on January 31, 1950, and that certain order fixing the time for hearing of said motion and petition of said First [19745] Federal Savings and Loan Association of Wilmington filed herein on February 10, 1950; reference to each of said orders is hereby made for further specification.

3. That although due notice was given to each Association and person who could possibly be interested in the disposition of any money, either in court or in the hands of the San Francisco Bank, no person or Association so notified, or otherwise, has appeared to enter or make any objection or protest concerning the disposition of such funds, save and except those actually present in court through their counsel to wit: San Francisco Bank, Home Loan Bank Board, William K. Divers, J. Alston Adams, O. K. LaRoque, John H. Fahey, A. V. Ammann, and Federal Savings and Loan Insurance Corporation.

4. That the above actions, entitled Mallonee, et al., vs. Fahey, et al., No. 5421-PH and Los Angeles Bank et al., vs. San Francisco Bank, et al., No. 5678-PH(WM) have heretofore been ordered consolidated for all purposes.

5. That said actions were and each of them was

commenced and at all times since have been and now are being prosecuted and maintained by the plaintiffs therein, and each of them, through their respective counsel of record, in good faith and on reasonable grounds. That the cross-claims of all parties to said consolidated actions, including but not limited to Federal Home Loan Bank of Los Angeles, were filed, and at all times since, have been and now are, being prosecuted and maintained in good faith and on reasonable grounds. That all other pleadings filed and appearances made, by any or all of said plaintiffs, third-party plaintiffs and cross-claimants, in either or both said consolidated actions Nos. 5678-PH and 5421-PH, were filed and made, and all proceedings had, in each of said actions on the part of any or all of said parties, have been carried on and are now being carried on by said parties through their [19746] respective counsel of record in good faith and on reasonable grounds. That evidence of said good faith and reasonable grounds is illustrated by, but not limited to, the findings, conclusions and recommendations of the Special Committee Report of the United States Congress filed as an exhibit in the proceedings had upon the motion for attorneys' fees by the plaintiffs in said Action No. 5678-PH.

6. That the above-entitled actions were filed and since have been maintained and prosecuted as Class actions; 5421-PH being originally filed on behalf of approximately 16,000 shareholder depositors of the Long Beach Federal Savings and Loan Association, and 5678-PH filed for all of the groups of

Federal Savings and Loan Associations, State Building and Loan Associations and other financial institutions, all members and stockholders of plaintiff Federal Home Loan Bank of Los Angeles.

7. That on or about the 29th day of March, 1946, the Federal Home Loan Bank of Los Angeles had assets of approximately $46,000,000.00, was entirely solvent, and had a surplus of approximately $1,900,000.00. That the business, property and assets of said Los Angeles Bank as well as the property and assets of its shareholder and member Associations then in the possession of the Los Angeles Bank either as pledgee, depositary, custodian, trustee or bailee, or otherwise, were, on or about March 29th, 1946, and without notice, hearing or trial, seized among others by defendants Fahey and Ammann and purportedly on said date of March 29th, 1946, the said Los Angeles Bank was by said defendants, liquidated, consolidated, merged and dissolved. That the defendant and cross-defendant Federal Home Loan Bank of San Francisco and/or Federal Home Loan Bank of Portland, on said date, and acting in concert with Fahey, Ammann and other defendants and [19747] cross-defendants, received and took possession and control of said assets herein referred to and which at the time of said seizure, were in possession of the Federal Home Loan Bank of Los Angeles. That after said seizure, the said San Francisco and/or Portland Bank has ever since been in possession of said assets and since said date the plaintiff Los Angeles Bank, as such, has had no property or

assets in its actual possession or under its actual control with which to employ counsel. That on said date said assets were purportedly transferred by certain defendants to said Portland Bank without any consideration to the Los Angeles Bank or any of its member stockholders and without any resolution by the Portland Bank requesting permission to acquire any assets of the Los Angeles Bank and without any resolution or request of the Portland Bank to assume any of the liabilities of the Los Angeles Bank. That simultaneously with said seizure the name of said Portland Bank was purportedly changed to Federal Home Loan Bank of San Francisco by the Federal Home Loan Bank administration.

8. That in these actions in which have heretofore been filed numerous and sundry cross-claims, interventions, third-party pleadings, motions and petitions and other matters in interpleader or in the nature of the interpleader pursuant to which and under proceedings and hearings thereon, after notice duly given, there has been deposited in this court assets amounting to approximately $14,000,000.00 which now remain in the registry of this court waiting disposition by further order, proceeding or adjudication of this court and which cannot be disposed of without order of this court. That said assets in the registry of this court are adequate to cover the allowance of attorneys' fees hereinafter made, without the requirement of the deposit of additional money or property.

9. That the San Francisco Bank has in its possession, or in the registry of the court, funds of many Savings and Loan Associations, members of the class or classes represented by the Association plaintiffs, which said funds will include funds merely [19748] on deposit in said San Francisco Bank, and not held by said San Francisco Bank as collateral. That said funds herein described are substantially in excess of the allowance of attorneys' fees hereinafter made.

10. That there is evidence that certain defendants herein have by intimidation, sought to prevent and preclude plaintiffs herein and Associations of the class represented by them from obtaining the advice or services of counsel to protect the interests of said Association or to represent them in court. That said intimidation has been evidenced by apparent threats of seizure if such Associations spent or appropriated funds for legal expenses or attorney fees in that the record discloses that on March 15, 1946, the Los Angeles Bank, by resolution, appropriated funds for legal expenses and attorney fees in connection with the investigation by the Sub Committee of the United States Congress and that defendant John H. Fahey was advised of such resolution on or about March 18, 1946, and that thereafter to wit, on or about March 29, 1946, said Los Angeles Bank was seized in the manner hereinbefore specified. That subsequent to the seizure of the Los Angeles Bank and prior to seizure of the Long Beach Federal Savings and Loan Association spot checks of the various Associations were made

at the instigation of certain defendants herein for the purpose of ascertaining whether or not other Associations were making appropriations for the same purposes. That on May 8, 1946, the Long Beach Federal Savings and Loan Association appropriated funds by resolution for the purpose of employing counsel to conduct appropriate legal proceedings to restrain the Federal Home Loan Bank Commissioner or his deputies from interfering with the normal and proper conduct of the affairs of the said Long Beach Federal Savings and Loan Association, and that on [19749] May 20, 1946, the assets of the said Long Beach Federal Savings and Loan Association were seized without notice or hearing by, among others, the same defendants who seized the Los Angeles Bank. That in December, 1949, certain officers of plaintiff First Federal Savings and Loan Association were approached by representatives of certain defendants for the purpose of ascertaining whether or not the said Association had appropriated funds to pay its attorney in connection with the above proceedings. That said acts and conduct as herein described furnished and furnish reasonable ground for the plaintiffs in Action 5678-PH and the Associations represented by them to believe that if said Associations or any of them appropriated, or now appropriates, or uses their funds for purposes of defraying legal expenses or counsel fees that they might have been, or may likewise be, seized in the manner that the said Los Angeles Bank and Fed-

eral Savings and Loan Association of Long Beach were seized.

11. That a portion of the books and records of San Francisco Bank reveal that out of the funds in the possession of the San Francisco and/or Portland Bank hereinbefore described and which funds consisted of assets of the Los Angeles Bank co-mingled with funds of the Portland Bank, the said San Francisco Bank has paid, for the purpose of resisting plaintiffs' claims, the sum of approximately $100,000.00 to defray legal expenses and attorney fees in addition to indirect or other expenses not presently known.

12. That no delay in the prosecution of any of the phases of this litigation has occurred on the part of plaintiffs, cross-claimants or others seeking relief against defendants and said plaintiffs and cross-claimants have diligently prosecuted and maintained this action and these proceedings. That for approximately one year no active proceedings were had in these cases for the [19750] reason that settlement negotiations were being discussed and said negotiations proceeded actively from December, 1948, until on or about the first part of October, 1949. That Attorney Peyton Ford, the Assistant to the Attorney General of the United States, as attorney for defendants, Home Loan Bank Board, William K. Divers, J. Alston Adams, O. K. LaRoque, John H. Fahey, A. V. Ammann and Federal Savings and Loan Insurance Corporation, on behalf of certain defendants wrote and

caused to be filed in the record a certain letter and which said letter was relied upon by counsel and the court, and which stated, in part, as follows:

"(1) The attorneys' fees, whether interim or final, shall be judicially determined in an adversary proceeding and the stipulation dated March 22, 1949, and the subsequent award of April 1, 1949, be vacated, or

"(2) Following the suggestion of the court, one-third of the amount awarded by the court in its decision of April 1st shall be paid now on proper order of the court (less the deduction of $50,000 previously paid, as provided in presently proposed order), regardless of the outcome of negotiations for settlement; the said stipulation and award shall be vacated and any further attorneys' fees shall be judicially determined in an adversary proceeding at the conclusion of negotiations for settlement, if agreement thereon be reached, or in the litigation, if such there be, or

"(3) Following the suggestion of Mr. Fussell, one-third of the amount awarded by the court in its decision of April 1, 1949, to be paid now as an interim allowance on account by order of the court (less the deduction of $50,000 previously paid as provided in presently proposed order) regardless of the outcome of any further negotiations for settlement; the said stipulation and award shall be vacated and any further attorneys' fees shall be determined by the court on such showing

as the court may require, subject to agreement of the parties as to the maximum amount thereof at the conclusion of negotiations for settlement, if agreement thereon be reached. If no settlement be reached, any additional fees shall be judicially determined in said litigation."

That said letter was dated April 27, 1949, and was written by Attorney Peyton Ford, Assistant to the Attorney General of the United States, as attorney for the above-listed Defendants in connection with the request that counsel for the plaintiffs, Mallonee, et al., and counsel for the Long Beach Federal Savings and Loan Association, and counsel for the Title Service Company and counsel [19751] for Robert H. Wallis, stipulate and agree that the Court's announced order fixing an amount of approximately $540,000.00 as an allowance on account of attorneys' fees on account of services rendered, be vacated and set aside and that a new and different allowance on account in the amount of only approximately one-third thereof be ordered entered at said time.

That a true and correct copy of said letter was ordered filed in the within proceedings by Order of this Court duly made and entered May 10, 1949. That this Court and the parties and all of them, relied upon said letter of said Attorney Peyton Ford, Assistant to the Attorney General of the United States, dated April 27, 1949.

That in reliance upon said representations in the said letter dated April 27, 1949, and signed by

Attorney Peyton Ford, Assistant to the Attorney General of the United States, as attorney for Defendants Home Loan Bank Board, William K. Divers, J. Alston Adams, O. K. LaRoque, John H. Fahey, A. V. Ammann, and Federal Savings and Loan Insurance Corporation, the said parties did so stipulate to the vacating of said priorly announced attorneys' fee order, and in reliance thereon this Court did make and duly enter its Findings of Fact, Conclusions of Law and Order for Interim Allowances on Account of Attorneys' Fees, prior to December 15, 1948, which Order was duly made and entered May 10, 1949, and which said Order and Judgment has now become final.

The motions of various parties to compel San Francisco Bank to refund costs, expenses and/or attorney fees heretofore paid or advanced outside of, and without order of this Court, by the said Federal Home Loan Bank of San Francisco, and its officers and directors, is not considered a necessary part of this Order allowing interim attorneys' fees on account to counsel for Plaintiffs in Consolidated Action 5678-(WM)-PH, and is therefore, placed off calendar and not now decided. [19752]

13. That in prior proceedings during the approximate four years in which these cases have been pending before this court and/or the United States Circuit Court of Appeals and/or United States Supreme Court, there have been many hearings at which testimony was taken and evidence introduced. That such hearings resulted in orders,

injunctions and judgments which orders, injunctions and judgments contained various Findings of Facts, many of which have become final by expiration and lapse for the time of appeal or review thereof and as to the matters and [19753] things therein covered are res adjudicata. That among other things recited in one or more of said orders heretofore made by this court it has been held by this court that it has jurisdiction of the parties and subject matter of the litigation from certain of which orders so holding appeals were taken by the Home Loan Bank Board and/or its agents, and thereafter dismissed. That this court has jurisdiction over the parties and subject matter of the within actions.

14. O'Melveny and Myers and Richard FitzPatrick have rendered legal services in said consolidated action for and on behalf and for the benefit of and as counsel of record for Federal Home Loan Bank of Los Angeles, and the parties plaintiff in Action No. 5678-PH(WM) other than said Los Angeles Bank in substance, manner and form as is averred in detail in that certain affidavit of Pierce Works and John Whyte filed herein on or about January 6, 1949, in that certain affidavit of Paul Fussell and John Whyte filed herein on or about July 8, 1949, in that certain affidavit of Paul Fussell filed on or about April 7, 1950, and in those three certain affidavits of Richard FitzPatrick filed respectively on January 6, 1949, July 8, 1949, and April 7, 1950. All averments of fact with refer-

ence to the rendition of said services have been admitted. The court finds each and all of said averments of fact with reference to said services to be true, and that said services were rendered for and on behalf of, and for the benefit of, said Los Angeles Bank and said other members of said class. For that reason no detailed findings thereon are herein made, but reference is had to said affidavits and the evidence herein for further particulars. In this connection the court further finds that on or about August 22, 1949, W. I. Gilbert, Jr., was substituted as counsel of record for First Federal Savings and Loan Association of Wilmington in the place and stead of O'Melveny and [19754] Myers and Richard Fitzpatrick and that since said date said O'Melveny and Myers and Richard Fitzpatrick have rendered no services for said Association.

15. W. I. Gilbert, Jr., has rendered legal services in said consolidated actions for and on behalf and for the benefit of and as counsel of record for First Federal Savings and Loan Association of Wilmington in substance, manner and form as is averred in detail in that certain affidavit of W. I. Gilbert, Jr., filed herein on or about February 17, 1950. All averments of fact with reference to the rendition of said services have been admitted. And the court finds each and all of said averments of fact with reference to the rendition of said services to be true and that said services were rendered for and on behalf of and for the benefit of said association and other members of said class. For that reason no detailed findings thereon are herein made

but reference is had to said affidavits and the evidence herein for further particulars.

16. Each of the plaintiff Associations in Action No. 5678-PH(WM) sue both for themselves and for all other associations, members or stockholders of said Los Angeles Bank as a class. Any and all services rendered to any of said plaintiff associations, as hereinabove found, inured directly to the benefit of each such plaintiff association and as well to the benefit of any and all member or stockholder associations of said Los Angeles Bank and to the protection and preservation of the assets and property of said plaintiffs and the class consisting of all members and/or stockholders of said Los Angeles Bank in the possession or purported possession of Federal Home Loan Bank of San Francisco.

17. Any and all services rendered said Los Angeles Bank, as hereinabove found, inured directly to the benefit of said bank, and to the protection and preservation of the business, [19755] property and assets formerly in the possession of said Los Angeles Bank and seized therefrom on March 29, 1946, as hereinabove found.

18. The value of the services rendered by O'Melveny and Myers and Richard Fitzpatrick as hereinabove found, is substantially in excess of the sum of $67,500.00.

19. The value of the services rendered by W. I.

Gilbert, Jr., as hereinabove found, is substantially in excess of the sum of $7500.00.

20. That plaintiffs nor any of them are estopped by reason of any act or conduct on their part or otherwise from receiving allowances on account of attorney fees.

21. That there is no specific finding as to the total value of the services rendered to the date for which payment was requested; the allowance herein is made an interim allowance on account only; the value of the services rendered substantially exceeds the amounts awarded. [19756]

Conclusions of Law

The Court Concludes:

1. In all respects as set forth in the foregoing Findings of Fact.

2. That upon the filing of the complaints herein, original jurisdiction vested in this Court, by virtue of the presentation of many federal questions, arising under the Constitution and laws of the United States, among which are:

(a) Constitutionality of the following Acts of Congress:

Home Owners Loan Act;
Federal Home Loan Bank Act;
First and Second War Powers Act;

and related acts and amendments to one or more of said acts.

(b) Constitutionality, construction and validity

of regulations and amendments and repeals of regulations by defendants Home Loan Bank Board and their predecessors, and by other governing authorities of the United States.

(c) Constitutionality, construction and validity of orders, adopted by, pursuant to, or under one or more of the foregoing, enumerated in (a) and (b) above.

That such Federal questions were amplified and enlarged by filings by various of the parties, including amended and supplemental pleadings subsequent to the mandate of the United States Supreme Court pursuant to its opinion in Fahey v. Mallonee, 332 U. S. 258. **[19757]**

3. The Court also has original jurisdiction because of the following interpleaders, or bills in the nature of interpleader:

(a) Title Service Company filed, in **June, 1946,** depositing notes and deeds of trust with an aggregate value of approximately $800,000.00 into the Registry of the Court, and likewise interpleading the legal titles to several thousands of parcels of real property conveyed to it as security for notes and deeds of trust aggregating a total of approximately $12,000,000.00.

(b) The deposit in Court by defendant and cross-defendant Robert H. Wallis of a $50,000.00 Cashier's check made payable to him for attorneys' fees and expenses for the defense of said association from seizure and threatened confiscation.

(c) The sum of approximately $1,500,000.00 in-

terplead into the Registry of this Court by the approximately 50 separate interventions and interpleaders by the borrowers and homeowners thereby clearing title to approximately 400 homes together with the notes and deeds of trust deposited with the Clerk of the Court, pursuant to the approximately 50 orders of Court in connection with such interventions and interpleaders.

(d) The $6,300,000.00 evidenced by four notes deposited pursuant to the order of this Court of March 31, 1948, which said notes were executed by defendant Ammann in favor of said San Francisco Bank.

(e) The $5,300,000.00 in face value of [19758] U. S. Government Bonds with attached coupons uncashed representing an additional several hundred thousand dollars in accrued interest thereon.

(f) The sum of $55,485.25 deposited in the Registry of this Court by said association in May of 1949 as disputed premiums claimed by defendant Federal Savings and Loan Insurance Corporation claimed to be due it upon account of the insurance by it of the accounts in deposit of said association.

(g) The sum of $18,503.52 rent interplead by defendant and cross-claimant George Turner in connection with rental on his lease of the association owned premises, hotel, etc., a subject of dispute and litigation and attempted cancellations of said lease by various of the parties hereto including said defendant Ammann as purported conservator of said association.

4. That the court concludes as a matter of law that the jurisdiction of this court attached with relation to said several various interpleaders and bills in the nature of interpleader and continues until final adjudication of the right of the various contending parties, concerning each and all of said property, money, claims, and obligations, duties, instruments, transactions, and occurrences related thereto.

5. That these consolidated actions seek determination of claims to, and the removal of liens and clouds upon specific real and personal property, physically located either within the territorial boundaries of the district of this United States Court or within the State of California or both. That this court has jurisdiction over such property and all parties concerned with [19759] said property, its title, ownership, possession or incidents.

6. That this Court had, and still has (1) jurisdiction under the Administrative Procedure Act and (2) plenary jurisdiction at law and in equity for determination of any and all issues joined by the pleadings herein, including, among other things, but not limited to, the following:

A. Administrative Orders of the Home Loan Bank Board:
   (a) Order No. 5082;
   (b) Order No. 5083;
   (c) Order No. 5084.

All dated March 29, 1946, concerning the claimed

liquidation and dissolution of the Los Angeles Bank, the creation of the San Francisco Bank, and other things therein set forth.

(d) Order of the Home Loan Bank Board No. 5254, of May 20, 1946, providing for the appointment of a conservator for said Long Beach Association.

(e) Order No. 388 of the Home Loan Bank Board, of January 17, 1948, providing among other things for the restoration of said Association and its assets and properties to said Association from said conservator.

B. Regulations or Other Actions of Home Loan Bank Board:

(f) Various rules and regulations contended to be invalid or inapplicable to said Long Beach Association.

(g) The charter of said Association.

7. That this Court having acquired jurisdiction, has the inherent power to make all necessary and appropriate orders to insure due process in the administration of justice and to facilitate full and complete hearings on the merits by [19760] litigants through their counsel. That such due process and full hearings require participation of counsel for the litigants for adequate presentation of the merits to the courts for consideration.

8. That through the determination in the previous orders of this Court, having been or become final by failure to appeal therefrom, or by dismissal

of appeals, they have become the law of this case, including the finding that this Court has jurisdiction of the parties and of the subject matter.

That the matters and persons concerned in this litigation and in Home Loan Bank Board Order No. 2015 and in proceedings which might be had thereunder, are overlapping, coincidental and mutually inter-related. The decision of one or more of the issues in either, likewise involves a decision of one or more of the issues in both said order No. 2015 and this litigation. This litigation and any proceedings which might be had under said Order No. 2015 involve the determination of common questions of law and of fact.

9. That defendants Home Loan Bank Board, et al., have made general appearances in this action, have sought and obtained affirmative relief from this Court, and have submitted to the jurisdiction of this Court. That previous orders of this Court have established that such general appearance and submission to the jurisdiction of this Court have been the subject of orders of this Court which orders have become final from lapse of time for appeal therefrom.

10. The general equity jurisdiction of this Court includes jurisdiction to decide any and all issues in these actions which have heretofore been consolidated for all purposes.

11. That in this case and consolidated actions, are two or more class actions, one a class action by Mallonee and others, as plaintiffs on behalf of all

the shareholders of the Long Beach Federal Savings and Loan Association; and the second cause of action, in consolidated case No. 5678-PH, is a class action on [19761] behalf of the stockholders of the Federal Home Loan Bank of Los Angeles; as to the motions to dissolve the San Francisco Bank, pending and not yet acted upon, it is asserted on behalf of movants to be a class action on the part and on behalf of all of the stockholders of said San Francisco Bank. [19762]

ORDER

Wherefore, good cause appearing,

It Is Ordered, Adjudged and Decreed that the clerk of this court be, and he hereby is, directed and required to pay forthwith, out of funds and moneys heretofore deposited and now on deposit in the Registry of the court in the above-entitled consolidated actions:

(a) The sum of $67,500 to Messrs. O'Melveny & Myers and Richard FitzPatrick, Esq., as and for fees on account for services heretofore rendered as hereinabove found;

(b) The sum of $7,500 to W. I. Gilbert, Jr., Esq., as and for fees on account for services heretofore rendered as hereinabove found.

The Court hereby specifically reserves power and jurisdiction to hear and determine in adversary proceedings or otherwise, any and all petitions and motions for determination, fixing, allowance, allocation, assessment, or apportionment, of attorneys'

fees, costs, and/or expenses, for or against any or all of the parties as in its discretion it may deem advisable or appropriate; except it is further ordered, that the amounts ordered hereby paid generally from the funds in the Registry of the Court are not by the terms of this Order, imposed, allocated or assessed upon or against any specific party or parties, fund or funds, provided, however, that it is hereby determined and ordered that the amounts, or any part thereof, herein allowed and ordered paid from said funds shall never be allocated against or imposed upon funds or assets owned by or belonging to the Long Beach Federal Savings and Loan Association, or any of its shareholders, members, or stockholders, either individually, or as an association, except as such association shall be required to bear as a member-shareholder only of a Federal Home Loan Bank. The intention being that the services for which fees are herein allowed are primarily for the benefit of said Los Angeles Bank and its association [19763] member-shareholders as distinguished from the Long Beach Association and other parties as separate entities or parties.

It is further ordered that Long Beach Association shall not at any time be required to deposit any additional money or property in court in these consolidated actions upon or because of the payment of all or any portion of the sums herein ordered and directed to be paid.

All matters and items not expressly herein allowed, disallowed or otherwise passed upon, are

continued submitted, pending the further order and determination of this Court.

Dated: This 19th day of June, 1950.

/s/ PEIRSON M. HALL,
Judge.

Judgment entered June 19, 1950.

[Endorsed]: Filed June 19, 1950. [19764]

PORTIONS OF PROPOSED FINDINGS OF FACT IN RE ATTORNEYS' FEES NOT ADOPTED BY DISTRICT COURT

6/19/50

The attached pages have been rewritten but should remain in files as showing them as originally submitted.

/s/ PEIRSON M. HALL,
Judge. [19733]

Federal Savings and Loan Association of Wilmington filed herein on February 10, 1950; reference to each of said orders is hereby made for further specification.

3. That although due notice was given to each Association and person who could possibly be interested in the disposition of any money, either in court or in the hands of the San Francisco Bank, no person or Association so notified, or otherwise, has appeared to enter or make any objection or

protest concerning the disposition of such funds, save and except those actually present in court through their counsel, to wit: San Francisco Bank, Home Loan Bank Board, William K. Divers, J. Alston Adams, O. K. LaRoque, John H. Fahey, A. V. Ammann, and Federal Savings and Loan Insurance Corporation.

4. That the above actions, entitled Mallonee, et al., vs. Fahey, et al., No. 5421-PH and Los Angeles Bank, et al., vs. San Francisco Bank, et al., No. 5678-PH(WM) have heretofore been ordered consolidated for all purposes.

5. That said actions were and each of them was commenced and at all times since have been and now are being prosecuted and maintained by the plaintiffs therein, and each of them, through their respective counsel of record, in good faith and on reasonable grounds. That the cross-claim of Federal Home Loan Bank of Los Angeles, in action No. 5421-PH, was filed and at all times since has been and now is, being prosecuted and maintained in good faith and on reasonable grounds. That all other pleadings filed and appearances made by either said plaintiff Bank or plaintiff Associations, in either or both of said consolidated actions, were filed and made, and all proceedings had in each of said actions, on the part of either of said parties, have been carried on, and are now being carried on by said parties, through their [19734] reason that settlement negotiations were being discussed and said negotiations proceeded actively from Decem-

ber, 1948, until on or about the first part of October, 1949. That Attorney Peyton Ford, the Assistant to the Attorney General of the United States, as attorney for defendants, Home Loan Bank Board, William K. Divers, J. Alston Adams, O. K. LaRoque, John H. Fahey, A. V. Ammann and Federal Savings and Loan Insurance Corporation, on behalf of certain defendants wrote and caused to be filed in the record a certain letter and which said letter was relied upon by counsel and the court and which stated, in part, as follows:

> "(2) Following the suggestion of the court, one-third of the amount awarded by the court in its decision of April 1st shall be paid now on proper order of the court (less deduction of $50,000.00 previously paid, as provided in presently proposed Order), regardless of the outcome of negotiations for settlement; the said stipulation and award shall be vacated and any further attorneys' fees shall be judicially determined in adversary proceedings at the conclusion of negotiations for settlement, if agreement thereon be reached, or in the litigation, if such there be, or * * *"

That said letter was written in connection with motions for allowance of attorneys' fees to other counsel in this litigation and which were pending during the settlement negotiations.

13. That in prior proceedings during the approximate four years in which these cases have been pending before this court and/or the United States

Circuit Court of Appeals and/or United States Supreme Court, there have been many hearings at which testimony was taken and evidence introduced. That such hearings resulted in orders, injunctions and judgments which orders, injunctions and judgments contained various Findings of Facts, many of which have become final by expiration and lapse for the time of appeal or review thereof and as to the matters and [19735] things therein covered are res adjudicata. That among other things recited in one or more of said orders heretofore made by this court it has been held by this court that it has jurisdiction of the parties and subject matter of the litigation from certain of which orders so holding appeals were taken by the Home Loan Bank Board and/or its agents, and thereafter dismissed. That this court has jurisdiction over the parties and subject matter of the within action.

14. O'Melveny and Myers and Richard Fitzpatrick have rendered legal services in said consolidated action for and on behalf and for the benefit of and as counsel of record for Federal Home Loan Bank of Los Angeles, and the parties plaintiff in Action No. 5678-PH(WM) other than said Los Angeles Bank in substance, manner and form as is averred in detail in that certain affidavit of Pierce Works and John Whyte filed herein on or about January 6, 1949, in that certain affidavit of Paul Fussell and John Whyte filed herein on or about July 8, 1949, in that certain affidavit of Paul Fussell filed on or about April 7, 1950, and in those

three certain affidavits of Richard Fitzpatrick filed respectively on January 6, 1949, July 8, 1949, and April 7, 1950. All averments of fact with reference to the rendition of said services have been admitted. For that reason no detailed findings thereon are herein made, but reference is had to said affidavits and the evidence herein for further particulars. In this connection the court further finds that on or about August 22, 1949, W. I. Gilbert, Jr., was substituted as counsel of record for First Federal Savings and Loan Association of Wilmington in the place and stead of O'Melveny and * * * [19736]

Order

Wherefore, good cause appearing,

It Is Ordered, Adjudged and Decreed that the clerk of this court be, and he hereby is, directed and required to pay forthwith, out of funds and moneys heretofore deposited and now on deposit in the Registry of the court in the above-entitled consolidated actions:

(a) The sum of $67,500 to Messrs. O'Melveny & Myers and Richard Fitzpatrick, Esq., as and for fees on account for services heretofore rendered as hereinabove found;

(b) The sum of $7,500 to W. I. Gilbert, Jr., Esq., as and for fees on account for services heretofore rendered as hereinabove found.

It is a condition of this order that no part of either of said sums shall be assessed ultimately against Long Beach Federal Association or its assets and that if, directly or indirectly by reason

of this order or by reason of the payment of the sums of money in and by this order directed to be paid the amount of money on deposit in the Registry of this court and belonging to said Long Beach Association shall at any time become less than a sufficient amount to act as full and adequate security for the notes of said Long Beach Association on deposit in said Registry, then and in that event said Long Beach Association shall not be ordered or directed to deposit additional security to replenish such deficiency.

The Court hereby reserves power to make such further determinations, and orders of allowances or disallowances of such matters and items with reference to attorneys' fees and costs and expenses of this litigation as it may hereafter determine to [19737] be meet and just.

Notwithstanding the foregoing reservation as to further or additional allowances upon account of attorneys' fees, expenses and costs, the sums herein ordered paid upon account of allowances of attorneys' fees are a final judgment of this Court and subject to appeal as such. The Court hereby expressly determines that there is no just reason for delay in decision of the matters herein contained and expressly directs the entry of the judgment contained herein.

Dated: This .... day of ....., 1950.

.....,

Judge.

Approved as to form this .... day of ....., 1950.

WESTOVER AND SMITH,

By .....,

Attorneys for Plaintiffs Mallonee, et al., in Civil Action No. 5421-PH.

CHARLES K. CHAPMAN, ESQ.,

By .....,

Attorney for Defendant, Third-Party Plaintiff and Cross-Claimant, Long Beach Federal Savings and Loan Association, in Civil Action No. 5421-PH.

W. I. GILBERT, JR., ESQ.,

By .....,

Attorney for Plaintiff, First Federal Savings and Loan Association of Wilmington, an Incorporated Association, in Civil Action No. 5678-PH(WM).

BISHOP AND HOFFMAN,
IRVING G. BISHOP, ESQ.,
PHILIP H. ANGELL, ESQ.,
VERNE DUSENBERY, ESQ.,

By .....,

Attorneys for Defendant, Federal Home Loan Bank of San Francisco, in Civil Action No. 5678-PH (WM), and Third-Party Defendant and Cross-Defendant in Civil Action No. 5421-PH.

LYMAN B. SUTTER, ESQ.,

By .....,

Attorney for Defendant and Cross-Claimant, Title Service Company, in Civil Action No. [19738] 5421-PH.

RICHARD FITZPATRICK, ESQ.,

O'MELVENY & MYERS,

PIERCE WORKS, ESQ.,

JOHN WHYTE, ESQ.,

By .....,

Attorneys for Plaintiffs Other Than First Federal Savings and Loan Association of Wilmington, an Incorporated Association, in Civil Action No. 5678-PH(WM) and Defendant, Third-Party Defendant, Cross-Claimant and Cross-Defendant, Federal Home Loan Bank of Los Angeles, in Civil Action No. 5421-PH.

RAYMOND TREMAINE, ESQ.,

By .....,

Attorney for Defendant and Cross-Claimant, Robert Wallis, in Civil Action No. 5421-PH.

ERNEST A. TOLIN, ESQ.,
United States Attorney,

PAUL FITTING, ESQ.,
Assistant U. S. Attorney,

By .....,

Attorneys for Defendant Ammann, Individually and as Conservator, in Civil Action No. 5421-PH, and John H. Fahey, Individually, Defendant in Civil Action No. 5678-PH(WM), and John H. Fahey, Individually and as Commissioner, Defendant and Cross-Defendant in Civil Action No. 5421-PH. [19739]

At a stated term, to wit: The February Term, A.D. 1950, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday, the 19th day of June, in the year of our Lord one thousand nine hundred and fifty.

Present: The Honorable Peirson M. Hall,
District Judge.

[Title of Cause.]

For hearing on (1) report of Ronald Walker, Special Master, as to how inspection of San Francisco Bank is progressing, pursuant to order therefor granted on Dec. 8, 1948, and (2) objections to

findings of fact and conclusions of law, and application for order staying payment of attorneys' fees on account; Wyckoff Westover, Esq., appearing as counsel for plaintiffs and Shareholders' Protective Committee; W. I. Gilbert, Jr., Esq., appearing as counsel for First Federal Savings & Loan Assoc., Wilmington; Chas. K. Chapman, Esq., appearing as counsel for defendant Long Beach Federal Savings & Loan Assoc.; Pierce Works, Esq., appearing as counsel for defendant Federal Home Loan Bank of Los Angeles; Irving Bishop and P. N. Angell, Esqs., appearing as counsel for defendants Federal Home Loan Bank of San Francisco; Paul Fitting, Ass't U. S. Att'y, appearing as counsel for Federal Home Loan Bank Board, John H. Fahey, and A. V. Ammann; and Ronald Walker, Special Master, present;

Court orders that hearing on (1) report of Ronald Walker, Special Master, etc., is continued to July 24, 1950, 10 a.m.

Court hears counsel re (2) objections, and settled findings of fact and conclusions of law and order re allowance of attorneys' fees on account which are filed. [19772]

Court orders that ex parte application for staying payment of attorneys' fees on account is denied, except that stay is hereby granted to 5 p.m., June 29, 1950, on, or before which time notice of appeal and application for stay be filed, and, if filed, that further stay is granted until the Court of Appeals either grants a stay pending its decision, or denies same. [19773]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that defendants, cross-defendants, third-party defendants, and defendants in intervention, as the case may be, Home Loan Bank Board, William K. Divers, Chairman, J. Alston Adams, Member, and O. K. LaRoque, Member, of the Home Loan Bank Board, the Federal Savings and Loan Insurance Corporation, John H. Fahey, A. V. Ammann, and George K. Bramley, hereby appeal to the Court of Appeals for the Ninth Circuit from the "Findings of Fact, [19775] Conclusions of Law, and Order Re Allowance of Attorneys' Fees on Account," dated and filed in the above-captioned actions on June 19, 1950, and entered on June 19, 1950, in Judgment Book 66 at pages 524 through 545, both inclusive.

Dated: June 20, 1950.

ERNEST A. TOLIN,
United States Attorney,

CLYDE C. DOWNING, and
PAUL FITTING,
Assistant U. S. Attorneys,

By /s/ PAUL FITTING,

Attorneys for Home Loan Bank Board, William K. Divers, Chairman, J. Alston Adams, Member, and O. K. LaRoque, Member, of the Home Loan Bank Board, the Federal Savings and Loan Insurance Corporation, John H. Fahey, A. V. Ammann and George K. Bramley.

[Endorsed]: Filed June 20, 1950. [19776]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Federal Home Loan Bank of San Francisco, sometimes referred to in this consolidated action as Federal Home Loan Bank of Portland, Defendant, Cross-Defendant, and Third-Party Defendant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from [19777] the "Findings of Fact, Conclusions of Law, and Order Re Allowance of Attorneys' Fees on Account," dated and filed in the above-captioned actions on June 19, 1950, and entered on June 19, 1950, in Judgment Book 66 at pages 524 through 545, both inclusive.

Dated: June 20, 1950.

/s/ VERNE DUSENBERY,

/s/ PHILIP H. ANGELL,

/s/ IRVING BISHOP,

/s/ SYLVESTER HOFFMAN,

Attorneys for Defendant, Cross-Defendant and Third-Party Defendant Federal Home Loan Bank of San Francisco.

[Endorsed]: Filed June 20, 1950. [19778]

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

Appellant Home Loan Bank of San Francisco hereby designates to be contained in the Record on Appeal to the United States Court of Appeals for the Ninth Circuit from the "Findings of Fact, Conclusions of Law, and Order Re Allowance [19779] of Attorneys' Fees on Account," dated and filed in the above-captioned actions on June 19, 1950, and entered on June 19, 1950, in Judgment Book 66 at pages 524 through 545, both inclusive, all of the record, proceedings, and evidence in the above consolidated causes.

Dated: June 21, 1950.

/s/ VERNE DUSENBERY,

/s/ PHILIP H. ANGELL,

/s/ IRVING BISHOP,

/s/ SYLVESTER HOFFMAN,

Attorneys for Defendant, Cross-Defendant, and Third Party Defendant Federal Home Loan Bank of San Francisco.

[Endorsed]: Filed June 21, 1950. [19780]

[Title of District Court and Cause.]

ANSWER OF A. V. AMMANN AND GEORGE K. BRAMLEY TO FIFTH SUPPLEMENTAL CROSS-CLAIM IN INTERPLEADER OF TITLE SERVICE COMPANY

Come now the defendants, A. V. Ammann and George K. Bramley, and file this their answer to the Fifth Supplemental Cross-claim in Interpleader of Title Service Company and state:

First Defense

I.

The Fifth Supplemental Cross-claim in Interpleader of Title Service [19786] Company fails to state a claim upon which relief can be granted.

Second Defense

I.

These defendants incorporate as if the same were a part hereof all the denials and statements in the Separate Answer of A. V. Ammann to Cross-claim in Interpleader of Title Service Company and their answers, or the answers of either of them, to the plaintiffs' First Amended and Supplemental Complaint, to the Amended Cross-claim and Supplemental Cross-claim of Defendant Long Beach Federal Savings and Loan Association to the Third Party Cross-claim of the Federal Home Loan Bank of Los Angeles, and to the Supplemental Cross-

claim in Interpleader, the Second Supplemental Cross-Claim in Interpleader, the Third Supplemental Cross-claim in Interpleader, and the Fourth Supplemental Cross-claim in Interpleader of the Title Service Company, all in the above-entitled actions.

II.

These defendants state that from May 20, 1946, on which date he was so appointed by the said Federal Home Loan Bank Administration, to January 24, 1948, upon which date he was removed by order of this Court, excepting October 1 and 2, 1946, defendant A. V. Ammann was duly appointed and acting conservator for the Long Beach Federal Savings and Loan Association.

III.

These defendants deny that any of the aforesaid interpleaders were necessary or proper.

IV.

These defendants state that the defendant A. V. Ammann does not and never has asserted any claim adverse or contrary to the Long Beach Federal Savings and Loan Association. These defendants state that during the time he was such conservator the said A. V. Ammann performed the functions and duties of the office of said conservator but that since January 24, 1948, he never has been or claimed to be conservator nor claimed, asserted, or exercised any right or power in connection with any asset or property of the [19787] Long Beach Federal Savings and Loan Association.

V.

These defendants are informed and believe and therefore state the facts to be, with respect to the said note and deed of trust held by cross-defendant Lillian A. Coggswell, as follows:

(1) In September, 1946, the said Lillian A. Coggswell advised an employee of the Long Beach Federal Savings and Loan Association at the offices of the said Association that she held a first lien on the property described in the Fifth Supplemental Cross-claim in Interpleader of Title Service Company; that upon inquiry by the employee of the Long Beach Federal Savings and Loan Association at that time it was determined that the lien of the said Lillian A. Coggswell was inferior to the lien of the Assciation; that later in the same month the said Lillian A. Coggswell came to the offices of said Association and paid off in full the loan held by the Association on said property; that accordingly the Association delivered to the said Lillian A. Coggswell the original deed of trust, the original deed of trust note perforated with "Paid" stamp and executed request for reconveyance, and a fire insurance policy of the Merchants' and Manufacturers Insurance Company; that the said Lillian A. Coggswell acknowledged receipt of these documents on a copy of a letter addressed to her by the Association; that the records of the Association indicate that before the appointment of the conservator the Association had requested the trustee to institute foreclosure proceedings; that on or about October

8, 1946, the attorney for the said Lillian A. Coggswell wrote to the Long Beach Federal Savings and Loan Association that it had been the intention of the said Lillian A. Coggswell to take an assignment of the note and deed of trust rather than to repay the said loan; that on [19788] or about October 10, 1946, the said attorney for the said Lillian A. Coggswell returned the documents given on or about September 27, 1946, to the said Lillian A. Coggswell and requested that the Association give the said Lillian A. Coggswell an assignment of these documents in order that she might proceed to collect the balance of the money due on the said loan or foreclose the deed of trust if that became necessary; and that in accordance with this request the Association assigned the loan to the said Lillian A. Coggswell without recourse to it.

(2) That the books and records of the Long Beach Federal Savings and Loan Association accurately reflect the aforesaid transaction, and that the said books and records, and all documents received by the Association during the period of the conservatorship properly retainable by it were delivered pursuant to the order of this Court to the custody of those persons designated by the Court on or about January 24, 1948, and are incorporated in and are a part of the Accounting of the defendant A. V. Ammann furnished pursuant to the order of this Court.

VI.

Except as specifically admitted herein, these de-

fendants deny each and every allegation of said Fifth Supplemental Cross-claim in Interpleader.

Third Defense

By way of a further and separate defense these defendants state on information and belief that the Fifth Supplemental Cross-claim in Interpleader of Title Service Company is not filed in good faith and that no bona fide controversy exists with respect to the aforesaid transactions.

* * *

Wherefore, these defendants pray that the Fifth Supplemental Cross-claim in Interpleader of Title Service Company be dismissed, that these defendants recover their costs and disbursements herein and for [19789] such other and further relief as may be proper in the premises.

Date June 23, 1950.

ERNEST A. TOLIN,
United States Attorney,

By /s/ PAUL FITTING,
Assistant U. S. Attorney, Attorneys for Defendants
A. V. Ammann and George K. Bramley.

District of Columbia,
City of Washington—ss.

A. V. Ammann, being first duly sworn, deposes and says:

That he is the defendant A. V. Ammann in the consolidated actions in the United States District

Court for the Southern District of California, known as Mallonee, et al. v. Fahey, et al., and Federal Home Loan Bank of Los Angeles, et al. v. Federal Home Loan Bank of Portland, et al., Civil Actions 5421-P.H. and 5678-P.H.; that he has read the foregoing Answer and knows the contents thereof and that the same is true to his own knowledge, except as to those matters which are therein stated on information and belief, and as to those matters he believes them to be true.

/s/ A. V. AMMANN.

Subscribed and sworn to before me, this 22nd day of June, 1950.

[Seal] /s/ JOSESPHINE A. STERLING,
Notary Public in and for the
District of Columbia.

Serial A 5758

District of Columbia

To All Whom These Presents Shall Come, Greeting:

I Certify That Josephine A. Sterling, whose name is subscribed to the accompanying instrument, was at the time of signing the same a Notary Public in and for the District of Columbia, and duly commissioned and authorized by the laws of said District of Columbia to take the acknowledgment and proof of deeds or conveyance of lands, tenements, or hereditaments, and other instruments in

writing to be recorded in said District, and to administer oaths; and that I am well acquainted with the handwriting of said Notary Public and verily believe that the signature and impression of seal thereon are genuine, after comparison with signature and impression of seal on file in this office.

In Witness Whereof, the Secertary to the Board of Commissioners of the District of Columbia, has hereunto caused the Seal of the District of Columbia to be affixed at the City of Washington, D. C., this 22nd day of June, 1950.

SECRETARY, BOARD OF COMMISSIONERS.

[D. C. Seal] By /s/ G. H. TURNER,
Asst. Secretary, Board of Commissioners.

[Endorsed]: Filed June 23, 1950. [19790]

[Title of District Court and Cause.]

ANSWER TO THE FIFTH SUPPLEMENTAL CROSS-CLAIM IN INTERPLEADER OF TITLE SERVICE COMPANY

Come now the defendants, Home Loan Bank Board, William K. Divers, Chairman, J. Alston Adams, Member, and O. K. LaRoque, Member, of the Home Loan Bank Board, John H. Fahey, and the Federal Savings and Loan Insurance Corporation, a corporate instrumentality of the United

States wholly owned by the United States, and for their defense to the Fifth Supplemental Cross-claim in Interpleader of the Title Service Company state: [19794]

First Defense

I.

The Home Loan Bank Board is an agency of the United States and the United States has not authorized or consented to suit against it. The Home Loan Bank Board and the United States are indispensable parties to the above-entitled actions and said Cross-claim.

II.

Said Board is an unincorporated body and is not a suable entity.

III.

The official residence of said Board is in the District of Columbia, and for the purposes of this Cross-claim said Board is an inhabitant of the District of Columbia. No service of process was had upon said Board within the State of California.

IV.

The official residences of William K. Divers, Chairman, J. Alston Adams, Member, and O. K. LaRoque, Member, of the Home Loan Bank Board, are in the District of Columbia, and for the purposes of said Cross-claim they are inhabitants of the District of Columbia. The residence of John H. Fahey is in the State of Massachusetts, and for the purposes of said Cross-claim he is an inhabitant of

said State. No one of these defendants is a resident or inhabitant of the State of California. The only attempted service of process on any of these defendants was in the District of Columbia. Service of process was not had upon any of said defendants in the State of California. The Court has not acquired jurisdiction over them and this action cannot be maintained against them in the State of California. These defendants deny that they are subject to the jurisdiction of this Court.

V.

The principal office of the Federal Savings and Loan Insurance Corporation is in the District of Columbia, it maintains no office in the State of California, and there is no officer or agent in California upon whom service of process has been or can be made. The only purported service of process on the Federal Savings and Loan Insurance Corporation has been in [19795] the District of Columbia. The Federal Savings and Loan Insurance Corporation has not been properly served with process.

VI.

Neither the Cross-claim nor the above-entitled actions or any part of them are an action to enforce any lien upon or claim to, or to remove any encumbrance or lien or cloud upon the title to, real or personal property within the District, nor do they involve any action in interpleader or in the nature of interpleader upon which an order for substituted service may be legally based.

VII.

William K. Divers, Chairman, J. Alston Adams, Member, and O. K. LaRoque, Member, of the Home Loan Bank Board, and John H. Fahey, and each of them are indispensable parties to this action and this Court has no jurisdiction over them or any of them.

Second Defense

I.

These defendants and each of them incorporate by this reference and make a part hereof all the defenses and statements in the answers of the Home Loan Bank Board, William K. Divers, Chairman, J. Alston Adams, Member, and O. K. LaRoque, Member, of the Home Loan Bank Board, and John H. Fahey, and each or any of them, to the plaintiffs' First Amended and Supplemental Complaint, to the Amended Cross-claim and Supplemental Cross-claim of Defendant Long Beach Federal Savings and Loan Association, to the Third Party Cross-claim of the Federal Home Loan Bank of Los Angeles and to the Cross-claim of the Title Service Company, and to the Cross-claim in Interpleader, the Supplemental Cross-claim in Interpleader, the Second Supplemental Cross-claim in Interpleader, the Third Supplemental Cross-claim in Interpleader and the Fourth Supplemental Cross-claim in Interpleader of the Title Service Company, and state that except as related in said answers, and as set forth in this answer, they are without knowledge or information sufficient to form a belief as to the

truth of the material allegations of said Cross-claim of the Title Service Company. [19796]

II.

These defendants state that there never was at any time a seizure of the Long Beach Federal Savings and Loan Association by the Defendant Ammann or by any of these defendants and state the facts to be as set forth in their above-incorporated answers. These defendants further state that on January 24, 1948, the said Ammann was removed as conservator for the Long Beach Federal Savings and Loan Association by order of this Court, and that since said date said Ammann has never had, asserted, or claimed any right or power in connection with the said Long Beach Federal Savings and Loan Association or any of its assets, but that from the date of his appointment on May 20, 1946, to said January 24, 1948, excepting October 1 and 2, 1946, said Ammann was conservator for the Long Beach Federal Savings and Loan Association.

III.

These defendants state that said Fifth Supplemental Cross-claim in Interpleader of Title Service Company and the interpleaders therein referred to are unwarranted, unnecessary and ineffective and are in fact and in law unrelated to the titles to property and not proper interpleaders.

IV.

Except as specifically admitted herein, these de-

fendants deny each and every allegation of said Fifth Supplemental Cross-claim in Interpleader.

Third Defense

I.

The said Fifth Supplemental Cross-claim in Interpleader of Title Service Company fails to state a claim upon which relief can be granted.

Fourth Defense

These defendants and each of them deny that he or it has or ever has had or asserted any claim or right to any fund in this Court or to any property in any way involved in this litigation located within the State of California, or any claim or interest to any property held, owned, or claimed by the Long Beach Federal Savings and Loan Association. [19797]

Wherefore, these defendants pray that the return of service of process upon the defendants, Home Loan Bank Board, William K. Divers, Chairman, J. Alston Adams, Member, and O. K. LaRoque, Member, of the Home Loan Bank Board, John H. Fahey, and the Federal Savings and Loan Insurance Corporation and each of them be quashed, that the Fifth Supplemental Cross-claim in Interpleader of Title Service Company be dismissed, that the defendants recover their costs and disbursements herein and for such other and further relief as may be proper in the premises.

Dated: June 23, 1950.

ERNEST A. TOLIN,
United States Attorney,

PAUL FITTING,
Assistant U. S. Attorney,

By /s/ PAUL FITTING,
Assistant U. S. Attorney, Attorney for Defendants, Home Loan Bank Board, William K. Divers, Chairman, J. Alston Adams, Member, and O. K. LaRoque, Member, of the Home Loan Bank Board, John H. Fahey, and the Federal Savings and Loan Insurance Corporation.

[Endorsed]: Filed June 23, 1950. [19798]

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

The appellants Home Loan Bank Board, an agency of the executive branch of the Government of the United States, William K. Divers, Chairman and J. Alston Adams and O. K. LaRoque, Members of the Home Loan Bank Board, the Federal Savings and Loan Insurance Corporation, a corporate instrumentality of the United States wholly owned by the United States, John H. Fahey, A. V. Ammann, and George K. Bramley hereby designate to be contained in the Record on Appeal to the United States Court of Appeals for the

Ninth Circuit from the "Findings of Fact, Conclusions of Law, and Order Re Allowance of Attorneys' Fees on Account," dated and filed in the above captioned actions on June 19, 1950, and entered on June 19, [19988] 1950 in Judgment Book 66 at pages 524 through 545, both inclusive, all of the record, proceedings and evidence in the above consolidated causes.

Dated: July 21, 1950.

ERNEST A. TOLIN,
United States Attorney,

CLYDE C. DOWNING, and

PAUL FITTING,
Asst. United States Attorneys.

By /s/ PAUL FITTING,
Attorneys for Defendants, Home Loan Bank Board, Wm. K. Divers, J. Alston Adams, O. K. LaRoque, Federal Savings and Loan Insurance Corporation, John H. Fahey, A. V. Ammann and George K. Bramley.

[Endorsed]: Filed July 21, 1950. [19989]

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING RECORD ON APPEAL

It appearing that the original forty days for filing the record in the below appeal with the Court of Appeals will expire on July 30, 1950, and it further appearing that the Clerk of this Court will not be able to file such record within such time:

It Is Hereby Ordered that the time for filing the record on appeal with the Court of Appeals for the Ninth Circuit in the appeal of the Federal Home Loan Bank of San Francisco and of the Home Loan Bank Board, et al., from the "Findings of Fact, Conclusions of Law, and Order Re Allowance of Attorneys' [19993] Fees on Account," dated and filed in the above captioned actions on June 19, 1950, and entered on June 19, 1950, in Judgment Book 66 at pages 524 through 545, both inclusive, is extended to and including August 12th, 1950.

Dated: 7/25/50.

/s/ PEIRSON M. HALL,
United States District Judge.

[Endorsed]: Filed July 25, 1950. [19994]

[Title of District Court and Cause.]

ORDER

It appearing that the exhibits described below are needed at the discovery hearings presently in progress before the Special Master of this Court;

It Is Hereby Ordered that photostatic copies may be filed in Court of exhibits 2-27-50-20 through 2-27-50-57, both inclusive, and exhibits 2-27-50-F and 2-27-50-G, and that the originals of said exhibits may be withdrawn from this Court.

Dated: 7/31/1950.

By /s/ PEIRSON M. HALL,
Judge of the United States
District Court.

[Endorsed]: Filed July 31, 1950. [19998]

[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT OF PROCEEDINGS

February 27, 1950

Appearances:

For Plaintiff and Shareholders Protective Committee:

WESTOVER & SMITH,
1009 Pacific Southwest Building,
Los Angeles, California; by
WYCKOFF WESTOVER, ESQ.

For Defendant and Cross-Claimant Long Beach Federal Savings & Loan Association:

CHARLES K. CHAPMAN, ESQ.,
17 Ocean Center Building,
Long Beach 2, California.

For Cross-Defendant Federal Home Loan Bank of San Francisco:

BISHOP & HOFFMAN,
215 West Fifth Street,
Los Angeles 13, California; by
IRVING G. BISHOP, ESQ.; and
PHILIP H. ANGELL, ESQ.,
San Francisco, California; and
VERNE DUSENBERRY, ESQ.,
Portland, Oregon.

For Defendant and Cross-Claimant Federal Home Loan Bank of Los Angeles:

O'MELVENY & MYERS,
900 Title Insurance Building,
Los Angeles 13, California; by

PIERCE WORKS, ESQ.; and

JOHN WHYTE, ESQ.; and

PAUL FUSSELL, ESQ.; and

RICHARD FITZPATRICK, ESQ.,
1400 Chapman Building,
Los Angeles 14, California.

Appearing Specially for Defendant Ammann, Individually and as Conservator; and for Defendant Fahey, Individually and as Commissioner:

ERNEST A. TOLIN,
United States Attorney,
Los Angeles 12, California; by

PAUL FITTING,
Assistant United States Attorney; and

DONALD B. MacGUINEAS,
Attorney, Department of Justice,
Washington, D. C.; and

WILLIAM F. McKENNA,
Assistant General Counsel,
Federal Home Loan Bank Board,
Washington, D. C.

For First Federal Savings & Loan Association of Wilmington:

W. I. GILBERT, JR., ESQ.,
939 Rowan Building,
Los Angeles 13, California.

For Defendant and Cross-Claimant Title Service Company:

LYMAN B. SUTTER, ESQ.,
512 Jergins Trust Building,
Long Beach 2, California.

For Defendant and Cross-Claimant Wallis:

RAYMOND TREMAINE, ESQ.,
210 West Seventh Street,
Los Angeles 14, California.

Also Present:

RONALD WALKER,
Special Master in Chancery. [3*]

February 27, 1950; 10:00 A.M.

(Other court matters.)

The Court: Mr. Clerk, all of the matters in the case of Mallonee v. Fahey are put over until 2:00 o'clock.

The court will be in recess until 2:00 o'clock. [6]

*** Page numbering appearing at top of page of original Reporter's Transcript of Record.**

February 27, 1950; 2:00 P.M.

The Court: Are there any ex parte matters?

The Clerk: Yes, your Honor.

(Other court matters.)

The Court: Very well. Mallonee vs. Fahey.

Mr. Works: The Los Angeles Bank is ready, your Honor, and also the member associations.

The Court: I understand there are three matters on for hearing this afternoon: first, a supplemental petition in connection with the deposit in court of the premium on the Federal Deposit Insurance Corporation.

Mr. Chapman: That is right.

The Court: Are you ready on that?

Mr. Chapman: Ready.

Mr. MacGuineas: Ready.

Mr. Westover: Ready for the plaintiff.

The Court: Second, an application for fees by the attorneys for the Los Angeles Bank, that is, the attorneys in the Los Angeles Bank case now consolidated with the other case, O'Melveny & Myers. And, third, the application for fees of Mr. Gilbert.

Mr. Gilbert: Ready for the First Federal of Wilmington.

The Court: Is everybody ready in everything?

Mr. Tremaine: If the court please, I am engaged in a [7] public utilities commission hearing and I got excused until 2:30. I ask the permission of this court to withdraw. However, I would like to make two short observations before I go.

The Court: Very well.

Mr. Tremaine: As to the application for the deposit of the insurance premiums, I wish to go on record as favoring the same and hoping that the precedent——

The Court: That is on behalf of——

Mr. Tremaine: Robert H. Wallis.

The Court: ——Robert H. Wallis?

Mr. Tremaine: Yes, sir.

As to the matter of fees, I would like to point out, in expressing my favor of the principle of the payment of such that the Home Loan Bank Board's attorneys have miscited the case of Winslow vs. Ferguson, which happens to be one I am rather familiar with, as I was the attorney to whom the payments were made in that case.

In that particular case—and I believe the record shows on page 778—that the fee was paid in two installments. The first portion was paid long before an interlocutory judgment was entered, and that was one of the points on appeal to the Supreme Court of California, and the propriety of the payment prior to the conclusion of the litigation was upheld by the Supreme Court of California. I notice that [8] that case has been cited in Shepard about a hundred times.

That is the only point that I want to make.

The Court: Thank you, and you may be excused.

Mr. Tremaine: Thank you. [9]

* * *

The Court: Perhaps the best thing for me to do is to allow the interpleader and overrule the objection and then if the Federal Deposit Insurance Cor-

poration desires that a portion of the money on deposit in court be withdrawn and paid to them they may make such a motion and notice it.

Mr. MacGuineas: That would make a good procedure.

The Court: Therefore the objections to filing the supplement to the interpleader are denied and the supplement is allowed.

Now the application of fees in the case of Mallonee vs. Fahey and others.

Mr. Works: We are ready on that matter, your Honor.

Mr. Chapman: I have a response I would like to serve on counsel.

Mr. Bishop: Your Honor, I have responses of the Federal Home Loan Bank of San Francisco and affidavits to file, today being the last day.

The Court: There were four documents filed on behalf of O'Melveny & Myers and Richard Fitz-Patrick, are there not, that is to say, one petition for the return of moneys advanced, and then there is a supplement to that.

Mr. Works: That is correct. [20]

The Court: And then a petition for fees and a supplement to that.

Mr. Works: That is correct.

The Court: What date was the supplement for petition for fees filed? I have a document filed July 8, 1949, notice of motion for leave to serve supplement to motion for order directing repayment of moneys heretofore advanced by the Shareholders Protective Commitee, and attached to that is the

motion for additional attorneys' fees. Very well. I have located the documents in the file. Let me look at them first. (Examining documents.)

What was the date of the order making the allowance last year of attorneys' fees and the final form of stipulation upon it was based?

Mr. Chapman: May 10, 1949, your Honor.

Mr. Westover: I have the order here, your Honor. It was filed May 10.

Mr. Chapman: I would be glad to look for them, your Honor.

The Court: Very well.

And the date of the filing of Mr. Ford's letter.

Mr. Chapman: That was also filed May 10.

The Court: The Home Loan Bank of San Francisco have filed an opposition only to the application of the First Federal Savings & Loan Association of Wilmington? [21]

Mr. Angell: No.

Mr. Bishop: No, they were filed a long time ago. Those are the ones we are filing today within the court's order. The others were filed previously.

The Court: How long ago?

Mr. Angell: About a year ago.

Mr. Gilbert: September 7th or 8th.

The Court: September 1949?

Mr. Gilbert: I believe it was either the 7th or 9th of September of 1949.

Mr. Angell: That is my recollection.

The Court: We will have to go after that file. I thought I had all of the files relating to this matter here.

The Clerk: What day in September do you think?

Mr. Bishop: September 9, 1949 is the date.

Mr. Works: Your Honor, to save time, I understand it is acceptable to all parties if we put on Mr. Morrow for the testimony as to the value of services, and Mr. Gilbert has Mr. Belcher and Mr. Darling here. We would appreciate it if we could follow that procedure, to take the evidence first and then argue the matter afterwards, if that is satisfactory to the court.

The Court: That is all right with me. The trouble of it is, I get a little curiosity now and then when a witness is on the stand and if I read what the parties have said in [22] their pleadings or objections, why I can ask him intelligent questions.

Mr. Works: I merely mention that, your Honor, because I don't understand that the objections go to the rendition or value of the services.

The Court: I had not noticed it in the Government's objection, that there was no objection either to the value of the services, that is, having any value, nor the fact that the services were rendered. There appear to be no factual objections. The Government's objection was based purely on questions of law.

I was not aware that the objection of the Bank had been filed to the application of O'Melveny & Myers and FitzPatrick. I see here their answer in opposition now. Do you raise any question of fact?

Mr. Angell: Not as to the value of the services.

The Court: Or the rendition?

Mr. Angell: Or the rendition.

The Court: Neither their rendition nor their value?

Mr. Works: That is my understanding, your Honor.

Mr. Angell: We raise objection to the allowance of the shareholders' expense items, not the attorneys' fees.

Mr. Bishop: There is a separate petition, your Honor, which you haven't mentioned today.

The Court: Yes, a separate petition to refund amounts [23] which they have expended and the Government objects, I understand, to one phase of it only.

Mr. Angell: Confining our remarks entirely to attorneys' fees, so far as the San Francisco Bank is concerned, we do not question the rendition of the services nor are we questioning the value of the services. There is no specific amount alleged or asked for, so we couldn't question those and, as far as I know, we do not intend to produce any witnesesses as to value, and there is no objection to Judge Morrow or any of the other witnesses on that subject being called out of order now, if that is the pleasure of the court.

The Court: Just a moment until I refresh my recollection of Mr. Ford's letter. (Examining document.)

Very well. You may proceed with your witnesses.

Mr. Works: Thank you, your Honor.

Mr. Morrow, please.

HUBERT T. MORROW

called as a witness by and on behalf of the petitioner O'Melveny & Myers and FitzPatrick, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: Hubert T. Morrow; M-o-r-r-o-w.

Mr. Works: Your Honor, as a preliminary matter I have prepared a chart here with reference to experience and legal training of the various men in our office who have worked on [24] these matters. It is certified by our office manager and I would personally vouch for its accuracy. It sets forth the date of birth, college attendance, law school attendance, date of admission to practice and, in the case of partners, when they became partners.

The Court: Do you wish to offer that as an exhibit?

Mr. Works: I should like to. Mr. Morrow has had occasion to study this graph.

The Court: In order that it may be formally in the record, I take it that both sides are agreeable to a stipulation that if John Doe—what is the name?

Mr. Works: There are about 15 names, your Honor, if each were called.

The Court: If each attorney on that list were called, that they would testify to that effect concerning the items which you have mentioned.

Mr. Works: Yes, your Honor, and such testimony may have been deemed to have been given.

Mr. MacGuineas: No objection.

(Testimony of Hubert T. Morrow.)

Mr. Angell: So stipulated.

The Court: Very well. That will be Exhibit No. 1. I guess we will have to get some kind of a new system for numbering these exhibits. The clerk tells me in trying to get the record up on appeal in the other case he is in almost inextricable difficulties. I think that the last time we had a [25] hearing we preceded the numbers with a date, did we not?

The Clerk: Yes, your Honor.

The Court: So we will precede these by 2-27-1.

The Clerk: For the plaintiff, your Honor?

The Court: For the petitioner, 2-27-1 for the petitioner O'Melveny & Myers and FitzPatrick.

Mr. Chapman: May I suggest adding the year? We did that in the last two hearings.

The Court: 2-27-50-1.

(The document referred to was received in evidence as Petitioner O'Melveny & Myers and Fitzpatrick Exhibit No. 2-27-50-1.)

(The document referred to is, in words and figures, as follows, to wit:) [26]

PETITIONERS' EXHIBIT No. 2-27-50-1

O'Melveny & Myers Personnel—In re Federal Home Loan Bank Cases

	Birth	College	Law	Admitted	Became Partner
Fussell	1-15-95	California	California	1920	1925
Works	1- 2-96	California	California	1922	1930
Chance	10- 5-06	California	California	1931	1940
Wall	7-28-12	Pomona	Yale	1937	1948
Carman	10- 5-05	Carlton College	Harvard	1930	1940
Whyte	3-11-11	Carlton College	U. of Minn., Minneapolis	1939	
Woolsey	1917	California	U.S.C.	1942	
Deards	4-24-11	Pomona	Loyola	1942	
Deegan	1914	Loyola	Loyola	1941	
Baird	6-27-14	U.C.L.A.	California	1940	
Dunlap	4- 3-18	Michigan	Michigan	1947	
Hamilton	6- 6-18	Nebraska	Harvard	1946	
Cahall	11-21-19	Swarthmore	Harvard	1946	
Forve	1-14-19	Lafayette	Georgetown	1949	
Clad	8-17-18	Dartmouth	Yale	1948	
Rauscher	3-30-21	Vanderbilt	Columbia Yale	Not	

(Signed) Ethel M. Strang, Office Manager.

Subscribed and sworn to before me this 20th day of February, 1950.

(Signed) Ruth Davis.
Notary Public in and for the County of Los Angeles, State of California.

(Testimony of Hubert T. Morrow.)

The Court: Proceed.

Direct Examination

By Mr. Works:

Q. Mr. Morrow, you are, I understand, an attorney at law admitted to practice in all of the courts of the State of California? A. Yes.

Q. When were you admitted to practice, please?

A. 1902.

The Court: Mr. Morrow, I think that everybody here in the courtroom, at least anybody with any California experience, would be willing to stipulate to your qualifications——

Mr. Angell: We will so stipulate.

The Court: ——but it may be that this matter may eventually get into the hands of judges who are not acquainted with you, so perhaps it would be better then to put his qualifications in the record.

Mr. Works: Very well, your Honor.

Q. You are a senior member of the firm of Morrow & Trippet at the present time? A. Yes.

Q. And you were associated in partnership for a great many years, were you not, with Judge Finlayson and James Bennett under the firm name of Finlayson, Bennett & Morrow?

A. Yes, sir; for some 20-odd years. [29]

Q. You have been admitted to what courts, Mr. Morrow?

A. In the State courts, of course, and this United States District Court, Circuit Court of Appeals of

(Testimony of Hubert T. Morrow.)

this State and the Supreme Court of the United States.

Q. Is it correct to say that your practice has been mainly concerned with litigation matters?

A. Mostly.

Q. Actual trial and appellate work and other activities connected with that type of activity?

A. Yes.

Q. I wonder if you would state to his Honor the experience that you have had with reference to the matter of fixing and determining attorneys' fees.

A. Well, the ordinary experience a man has of trying to collect his own, is the first and most intimate experience, I would say.

I once delivered an alleged address on the subject in 1923 to the Bar Association, which caused me a good deal of grief thereafter.

I have at times made certain tests of lawyers to determine their views and how nearly they agree. Generally they disagree.

And I have testified a number of times in the courts as to the value of attorney's services, I think always in the State courts, Superior Court; sometimes called by parties and [30] sometimes by judges.

And may I make a remark, because of the remark that was made here today, I do not receive any compensation when I testify as a witness to give my opinion as to the value of services.

The Court: I hope I did not touch you in any

(Testimony of Hubert T. Morrow.)

quick spot by my remark; it was only intended to be facetious.

The Witness: I understand, your Honor, but I just might as well let you know the fact just to straighten the record out. I do not charge anything of course, and I feel as though I am testifying really more for the court than I am for any party.

The Court: I certainly appreciate your being here.

Q. (By Mr. Works): Have you had occasion from time to time, Mr. Morrow, to acquire knowledge as to fees charged by other attorneys, particularly in this community?

A. I have very often.

Q. That runs back to the early days of your practice? A. From the beginning.

Q. Have you had occasion to familiarize yourself with the scope and general——

The Court: How long has that been?

The Witness: I was admitted in 1902. I started practicing in 1902 by myself. [31]

Q. (By Mr. Works): Have you had occasion to familiarize yourself with the scope and general nature of this pending litigation, the litigation embodied in these two consolidated cases?

A. Yes. I haven't read the whole record by any means though.

Q. That is understandable.

A. But I have spent several hours on the record and on the data that was furnished me.

Q. How much time have you spent in familiar-

(Testimony of Hubert T. Morrow.)

izing yourself with this litigation and with the services rendered by Richard FitzPatrick and O'Melveny & Myers in connection with these matters? Can you give us some idea?

A. It would have to be a rough estimate, because I kept no time on the matter, but I would say more than 12 hours.

Q. Have you read the affidavits filed on behalf of the Federal Home Loan Bank of Los Angeles and the five member associations with reference to the current application for attorneys' fees?

A. Yes, sir.

Q. Have you examined the information set forth in the exhibit which has been introduced here today, Exhibit 2-27-50-1? A. Yes, sir.

Q. Assuming all the facts stated in the affidavits in [32] question to be true, and assuming the data set forth in Exhibit 2-27-50-1 to be true, do you have any opinion at the present time as to the reasonable value of the legal services rendered by Richard Fitzpatrick and O'Melveny & Myers as set forth in such affidavits? A. I do.

Q. Will you please state that opinion?

A. $175,000.

Mr. Works: You may cross-examine.

The Court: That is to this date?

The Witness: No, sir, to June 30, 1949, I believe.

Mr. Works: Thank you, your Honor. I would like to correct that.

Q. June 30, 1949, I believe is the date?

(Testimony of Hubert T. Morrow.)

A. Yes.

The Court: Did you not file a supplement to that?

Mr. Works: That is the date the supplement came down, your Honor.

The Court: I thought there was one here just recently.

Mr. Works: Not by us, your Honor.

The Court: This was filed July 8, 1949?

Mr. Works: Yes.

The Court: Very well.

Mr. MacGuineas: May I ask one or two questions, your Honor? [33]

The Court: You may ask as many as you like.

Cross-Examination

By Mr. MacGuineas:

Q. Mr. Morrow, may I ask, in computing the sum of $175,000, did you figure that as a rate of so much per hour of attorneys' time?

A. No, but I checked it back on that basis.

Q. Would you just briefly state what the results of your check were?

A. Checking it back on an hourly basis?

Q. Yes.

A. You don't mind if I refer to my notes?

Q. Not at all.

A. I am not directly answering your question, but perhaps you would like to know first the basis that I used as well as my check-back, or just the check-back?

(Testimony of Hubert T. Morrow.)

Q. I would be glad to know the basis that you used to arrive at your figure, Mr. Morrow.

A. Yes.

I might say to you I have a note here that you are privileged to look at, that I wrote last night at home to coordinate my ideas, and I perhaps can shorten it by reading portions rather than speaking extemporaneously.

Among others that I considered, I considered these factors: The period involved, which was over three years. It [34] dated from March 29, 1946, as I recall it, to June 30, 1949.

I considered the long-drawn-out litigation and proceedings and the fact that such caused a loss of other business irrespective of the actual hours consumed.

Next I considered this litigation appeared to me to be extremely complicated and unique.

The Court: Are there any other superlatives that you could find in the dictionary? If there are I think you would be justified in applying them.

The Witness: I think I would, your Honor. I tried to be modest in this statement.

Next I considered that the attorneys on the other side of the case were able and have unlimited means of defense.

Next, that all lawyers involved here in this litigation and concerning whom I am testifying as to the value of their services, are men of the highest ability and experience.

Again that between the lawyers the firm of O'Mel-

(Testimony of Hubert T. Morrow.)

veny & Myers and Mr. FitzPatrick, they possess very special qualifications in various fields of the law that are involved.

Next, the firm of O'Melveny & Myers have an established and highly trained organization which only a few law offices could provide. In fact, that such litigation would disrupt most legal organizations and it might ruin some if they undertook such a litigation.

There is next a definite element of contingency of fee [35] involved.

I next considered that very large interests and amounts are involved here and that the result is very important.

I added in the thought that was always in my mind that when a lawyer dies he leaves nothing but a memory; he doesn't leave anything like a grocery store to be carried on by his widow.

The next think I considered was how much working time a lawyer has in a year.

I figured that a lawyer can devote five days a week and an average of five hours a day to legal work. I know lawyers work very much longer than that, but a man has to keep up with volumes of decisions, opinions, he has to do his general reading, he has to do his portion of charity work, he has to do a lot of work for the State Bar and his local bar. So I figured 365 days, less 52 Sundays, were 313 days, less half Saturdays, which would be 25 days a year, which left 288 days; take off 20 days for vacation, and that is 268 days. I took off 8

(Testimony of Hubert T. Morrow.)

days for illness and had 260 working days left and figured 1300 working hours a year.

I next figured how much gross income should lawyers of the standing of the partners of O'Melveny & Myers and Mr. Richard FitzPatrick be entitled to, roughly speaking, because that is anybody's estimate. I figured a basis of $60,000 gross for any man, any partner. [36]

Overhead will absorb at least a third, leaving not over $40,000 net before income taxes. I think that is a conservative figure and probably less than the average earnings of the lawyers involved, but it is a fairly good basis.

On account of the very large and old and skilled legal organization of O'Melveny & Myers, which facilitates the handling of such litigation, I feel that really I should use a higher figure for their contribution to the litigation than that of Mr. FitzPatrick perhaps. But for convenience I considered the partners' hours and Mr. FitzPatrick's hours on the same basis. That is no criticism of one man as against the other, but the fact that a large organization, with all its facilities, very often furnishes a larger part. But I have treated them as the same.

The total hours of O'Melveny & Myers and Mr. FitzPatrick——

The Court: That is, the partners?

The Witness: The partners; yes, sir.

The Court: There are five partners and Mr. FitzPatrick?

(Testimony of Hubert T. Morrow.)

The Witness: Yes, sir.

The Court: That will be six, that is the total hours of the six?

The Witness: Yes, sir, eliminating all their lawyers assistants, equals 2460 hours, as I have figured it, and I think I figured it carefully. That is one year and approximately [37] eleven months figured as solid time. That is 1300 hours for one year, plus 1160 hours—1160 hours is a little less than eleven months; that would be 1188 hours really, but I actually used the figure of 1160 hours—and that gave a total of $60,000, plus $53,000-odd, or a total of $113,537.80.

I added to that the time of John Whyte.

The Court: Just a moment. That is 2460 hours, or one year?

The Witness: One year and approximately eleven months.

The Court: At $60,000 a year?

The Witness: At $60,000 a year, yes, sir, gross. And I gave the total $113,537, and I stuck the 80 cents on but I dropped it later.

The Court: That is to say, that that would be one partner working one year and eleven months?

The Witness: Yes, sir, that is what that would be.

The Court: Very well.

The Witness: I added to that time the time of John Whyte, which was 860 hours. I put a value on that of $30 per hour, which I am inclined to think is low, it is not high, and that came to $25,-

(Testimony of Hubert T. Morrow.)

800, which added to the $113,537 previously mentioned gave me $139,337.

To that I added the time of all lawyer assistants. Of course that doesn't cover any expenses and all that, but the lawyer assistants, which was 406 hours I believe at $10 an [38] hour, which is low. I put it low purposely. We in our office carry that item at a higher figure in important cases. We carry it at $15, but anyway I put it at $10. And that amounted to $4060, which with the last figure above I mentioned gives a total of $143,397.

But I figured in figuring that I figured it on the basis of a cash fee, an assured fee, but here there is a distinct element of contingency, and there apparently was from the beginning, a consideration in my opinion that should be given to that. Therefore I added one-fourth of the estimated cash basis fee, which was $35,849, and it brought the total fee up to $179,291 as a proper fee.

However, there are tenuous things involved, such as the weight to be given to a contingency which must always be considered, certainly in figuring a fee, the extent of that contingency, so I just called it a round figure of $175,000.

I now come directly to your answer. I thought that that might be helpful, Mr. MacGuineas, to you to have the whole picture.

Mr. MacGuineas: As far as I am concerned, you have answered the question.

The Witness: I have a little more that is more direct to your question.

(Testimony of Hubert T. Morrow.)

I personally often use what I call a sight check-back method based upon somewhat arbitrary estimation of per hour [39] fees, which is a method we are sometimes compelled to use in certain types of litigation and with certain clients, and there is a difference among lawyers as to per diem charges. Personally I used my own view of a routine matter that would not be in anywise as extensive or as difficult as this. I used what I would call a common figure.

This check-back method, to my mind, does not truly reflect proper or adequate fees, but it is a safeguard for a man to see that he is somewhere within reason in his estimation because we often make estimates of fees I think by intuition and, generally speaking, we are about as close as all the figuring you can do.

I used the figure of $50 an hour for each partner and for Mr. FitzPatrick. I think probably without drawing any invidious distinction between Mr. FitzPatrick and the partners of O'Melveny & Myers, nevertheless from what I have said before as to their having, O'Melveny & Myers having, a well-built-up organization, with many, many facilities that aids them in doing work a single man can't do with a lesser organization, that I am sure $50 an hour for Mr. FitzPatrick is conservative and is more than conservative, in my opinion, to allow only the same figure for O'Melveny & Myers' partners. But I have used that for purposes of consistency.

(Testimony of Hubert T. Morrow.)

The 2460 hours at $50 an hour figured $123,000. Using the same system as above as to those who were not partners, add to [40] that Mr. Whyte's 860 hours at $30 per hour, or $25,800 added, plus the other lawyer assistants, a total of 408 hours at $10 an hour, namely, $4080, I arrived at a total of $152,880.

That fairly well compares with and is larger than the figure of $143,397 which I arrived at by the other method.

I will not read you the rest of it, but you can read it if you want to. There are some of my observations to myself, as I recall it.

Mr. MacGuineas: I think you have answered the question very thoroughly, Mr. Morrow.

The Court: Do you think that it should be read in order that the court may better understand your testimony?

The Witness: Let me see what it was first, your Honor, before I answer. They might be a little conceited sounding. I will go ahead and read them.

Perhaps others would consider my estimate too low. You understand I just wrote this for myself and I am using it because it saves time for me to tell all this and use a blackboard, which might take an hour and a half.

I myself feel as fair and conservative but certainly not in the least high. Putting myself in the place of the lawyers here claiming fees, which is a pretty sound way to arrive at a judgment of one's own opinion, I would say I would not knowingly

(Testimony of Hubert T. Morrow.)

get into such litigation without definite assurance of cash payment of a fee for the services here involved in the [41] amount I figured the total fee, with allowance of the contingency factor. Perhaps one would be foolish even then.

Your Honor will see why I would hesitate to read that.

The Court: In the last hearing I asked counsel who were here as witnesses whether or not, if someone would have walked into their office at the time this litigation began, and said, "Well, here is some litigation," and described generally its course, without any idea how complicated or involved it would be at the time, and said, "Well, you are going to be in it for the next three or four years, or maybe from now on, we do not know whether you will ever get any money or not," would you have taken that litigation on the basis of that statement?

The Witness: No, sir, I would not. I could not have. It would ruin a man's practice.

The Court: Do you know what actually is charged by O'Melveny & Myers for partners' time?

The Witness: No, sir, I do not.

The Court: Do you know what actually is charged by that firm of lawyers' time who are not partners? I think you referred to Mr. Whyte's time.

The Witness: John Whyte?

The Court: Yes. I mean the other lawyers here.

The Witness: No, sir, I do not know.

The Court: You do not? [42]

(Testimony of Hubert T. Morrow.)

The Witness: No.

The Court: In your office you charge $15 an hour for that work?

The Witness: Well, that varies, your Honor.

The Court: It varies as to the ability of the client to pay?

The Witness: Yes, sir, and the amount involved and the extent of the problem. My partner, Mr. Trippet, disagrees with me entirely. I often, and did only last week, cut the figure down in a certain case.

The Court: But does not each fee vary with the ability to pay and the amount involved and the intricacy or involvement of the case as well as the time involved?

The Witness: To a certain extent. As a matter of fact, in the canon of ethics of the American Bar Association there are stated the criteria, very well stated, as well as in any authority, the criteria to be taken into consideration. I happen to have that with me. It is Rule 12 of the American Bar Association, if your Honor wishes to look at it.

The Court: Is it long?

The Witness: It is about 20 lines.

The Court: Very well. Read it.

The Witness: "In determining the amount of fee it is proper to consider:

"1. The time and labor required, the [43] novelty and difficulty of the questions involved and the skill requisite properly to conduct the cause.

(Testimony of Hubert T. Morrow.)

"2. Whether the acceptance of employment in the particular case will preclude the lawyer's appearance for others in cases likely to arise out of the transaction and in which there is a reasonable expectation that otherwise he would be employed or will involve the loss of other employment while employed in the particular case for antagonisms with other clients.

"3. The customary charges of the bar for similar services.

"4. The amount involved in the controversy and the benefits resulting to the client for the services.

"5. The contingency or the certainty of the compensation.

"6. The character of the employment, whether casual or for an established or competent client.

"No one of these considerations in itself is controlling, they are merely guides in ascertaining the real value of the services."

There is also an excellent statement in one of the best cases in the case of Berry v. Chaplin, 74 Cal. App. (2d) 669, the opinion of Judge Emmet Wilson, which I will not read, but [44] it is a very clear statement involving the Chaplin fee.

The Court: Let me see it.

(The document referred to was passed to the court.)

The Court: Go ahead and read it.

The Witness: "The compensation of an attorney does not lie in the economic law of supply and

(Testimony of Hubert T. Morrow.)

demand like the fluctuating price of wheat and potatoes. (13) Among the factors to be considered in determining what constitutes a reasonable compensation for an attorney who has rendered services in connection with a legal proceeding are the nature of the litigation, its difficulty, the amount involved, the skill required and the skill employed in handling the litigation, the attention given, the success of the attorney's efforts, his learning, his age, and his experience in the particular type of work demanded (City of Los Angeles v. Los Angeles-Inyo Farms Co., 134 Cal. App. 268, 276 (25 P. 2d 224)); the intricacies and importance of the litigation, the labor and the necessity for skilled legal training and ability in trying the cause, and the time consumed. (Palm Springs etc. Co. v. Kieberk Corp., 46 Cal. App. 2d 234, 241 (115 P. 2d 548); Collins v. Welsh, 2 Cal. App. 2d 103, 110 (37 P. 2d 505).)"

The Court: Have you finished? [45]

Mr. MacGuineas: I have no further questions. Thank you.

The Court: One of the items mentioned in the American Bar Association's canons of ethics was the novelty of the litigation. Do you consider this litigation as presenting novel questions?

The Witness: To me, very. In all my experience I have never seen anything just like it. I was told that the record alone might weigh 150 pounds.

The Court: That was a year ago.

The Witness: To me it is unique and, as your

(Testimony of Hubert T. Morrow.)

Honor said a while ago, could I have thought of some other adjectives or adverbs I would have used them.

I read the case of the statutory 3-judge court opinion, I read Justice Jackson's opinion in the Supreme Court reversing, I read the Home Loan Bank Act of 1933 (I had never read it completely before), I read, not all the briefs, but several of them, and it seems to me that I can't think of any more difficult, more complicated, more unique litigation certainly in all my experience.

The Court: Do you think that you could safely say that it would tax anybody's legal ingenuity to meet the legal problems presented in connection with this situation?

The Witness: To the highest degree. There are all sorts of questions, a basic constitutional question, Section 5(b) of the Home Loan Bank Act, which was a very nice problem. [46]

The Court: Interpleaders, class actions——

The Witness: Yes, sir.

The Court: Government regulations?

The Witness: The only worse thing from that of being a lawyer in this case would be to be the judge of the case, and I am sorry for you.

The Court: This has gotten to be a habit with me. I do not know what is going to happen when the case ends, because as soon as we recess some other case we go to work on this at nights.

Now one other question, Mr. Morrow. You said there was an element of contingency involved here.

(Testimony of Hubert T. Morrow.)

I wonder if you would explain what you mean by that, what you have in mind.

The Witness: What I have in mind is this, that under no circumstances if an award is not made here—and of course that is none of my business at all, as to whether the attorneys are entitled to an award under the law, I know the theory, I have studied it—but if no award is made here then undoubtedly the attorneys will not be able to obtain an adequate fee, cash fee.

The Court: That is, if no award is made to them by this court?

The Witness: That is right; yes, your Honor. And that an award being made, that is a contingency, that is an uncertain quality. [47]

The Court: In all class actions are not such contingencies present?

The Witness: Yes, sir, dependent on the trust fund theory or theory of recovery in a receivership.

The Court: Or in a class action.

The Witness: Or in a class action. There is always a contingency involved.

I look at this as a man going in with his eyes wide open and realizing, perhaps not too well, that he is not going to get a cash fee from his clients, they can't pay it, they couldn't pay it, and that he is running a risk which he ought to be paid for as in any other contingent situation.

The Court: Did you read the affidavits filed in support of Mr. Gilbert's application for fees?

(Testimony of Hubert T. Morrow.)

The Witness: No, sir, I never heard of it until this noontime when I ran into Mr. Frank Belcher in connection with another matter. I didn't know anything about it.

The Court: I do not recall whether or not in connection with your application for fees you set forth the allegations that when the original appropriation for fee was made by the Long Beach Association that the Board caused spot checks to be made. Who prepared that?

Mr. Gilbert: I believe your Honor is referring to mine.

The Court: That is in yours?

Mr. Gilbert: Yes. [48]

The Court: But I saw it in another one. I was not sure whether it was yours that the spot checks were made in on other associations to determine whether or not they likewise were making appropriations.

Mr. Westover: I think in our response it is, your Honor.

The Court: Let me ask Mr. Morrow this: In some of the petitions here on file it is alleged that at the time the Long Beach Federal, on or about the time of the seizure of Los Angeles Bank and subsequent thereto and at about the time the Long Beach Federal board of directors passed a resolution authorizing the appropriation of $100,000 to oppose the dissolution of the Los Angeles Bank, that the Home Loan Bank Board, consisting of Mr. Fahey at that time, caused spot checks to be made of vari-

(Testimony of Hubert T. Morrow.)

ous associations belonging to the Home Loan Bank system looking solely to whether or not they likewise had appropriated money for counsel fees, and there is also an allegation to the effect in one of the petitions that that was done more or less recently—is that not correct, Mr. Gilbert?

Mr. Gilbert: Yes, it is, your Honor; December 10th, last year.

The Court: December 10, 1949?

Mr. Gilbert: Yes, sir.

The Court: Did you take any such thing as that into consideration in connection with your figures?

The Witness: No, sir, I did not. [49]

The Court: That is to say, whether or not each member of the class themselves could or could not pay the fee?

The Witness: No, sir, I did not take it into consideration. I just took into consideration the fact that to a considerable extent the amount of the fee, a proper fee, would be contingent.

The Court: Very well. Further cross-examination? Mr. Chapman?

Mr. Chapman: Yes, your Honor, if the other defendants are through.

The Court: San Francisco Bank?

Mr. Angell: No cross-examination.

The Court: The other official defendants?

Mr. MacGuineas: No.

The Court: Very well.

(Testimony of Hubert T. Morrow.)

Cross-Examination

By Mr. Chapman:

Q. Mr. Morrow, as one of the attorneys for the Long Beach Association, I was particularly interested in the things you took into consideration in determining the amount of this fee, and I would like to inquire whether or not some of the elements which do not appear to me to be considered by you might not affect the amount that you mentioned.

The risk to the client of confiscation for hiring an attorney and bringing this litigation is one of the burdens upon the attorney in taking on that litigation, is that not [50] correct?

Mr. Angell: Pardon me. Will you read that question back, Mr. Reporter.

(The question referred to was read by the reporter as follows:)

("Q. The risk to the client of confiscation for hiring an attorney and bringing this litigation is one of the burdens upon the attorney in taking on that litigation, is that not correct?")

Mr. Angell: If your Honor please, I object to that as incompetent, irrelevant and immaterial, not within any issue in this case, and if Mr. Chapman wants to take the witness stand to testify that is another thing. That is no question, that is a statement.

Mr. Chapman: I would like to be heard on that.

Mr. Angell: I object to it.

Mr. Chapman: We have a response which those

(Testimony of Hubert T. Morrow.)

facts are set forth. They have been undenied in this litigation in many previous verified statements.

The Court: Do you understand the question? Is it clear to you?

The Witness: May I state what I understand it to be? I am not sure I understand the question correctly, but I understand the question to mean that assuming that because this relates to the attorneys for he Los Angeles Bank, assuming [51] that those attorneys advised something that caused or might have affected confiscation of the bank by merging it with the Portland Bank and then turning it into the San Francisco Bank, had I taken that into consideration?

Mr. Chapman: I don't think that is the question, Mr. Morrow.

The Witness: I did not understand the question then.

The Court: The attorneys are appearing as attorneys for a class. They have Section 5 or Section 5(d) associations designated as members of the class of shareholders of the Los Angeles Bank.

The Witness: Yes, sir.

The Court: I think counsel's question is directed to the relationship of the attorney with the members of the class and each one who acted in that respect.

Mr. Chapman: That is correct, your Honor. I think I should amplify the question.

The Court: I think you can make the question a little clearer.

(Testimony of Hubert T. Morrow.)

Q. (By Mr. Chapman): Assume, Mr. Morrow, that an association which had made an appropriation for attorneys' fees was summarily seized, and that one of the grounds for such seizure given by the defendants who made the seizure, was a claimed appropriation by that association of money to attorneys' fees for the [52] defense of the institution, would the attorney bringing action for the six plaintiff associations in the Los Angeles Bank case, after such a seizure of another association, be taking a greater responsibility as an attorney and towards his clients than one engaged in ordinary litigation?

Mr. Bishop: Your Honor, I wish to object on the grounds that Mr. Chapman I don't think has any application for fees here. What difference does it make as to his position on his own allegations what the Long Beach Association does or doesn't do? What risk the attorneys assumed for the Long Beach Association has nothing to do with O'Melveny & Myers and Mr. FitzPatrick's application for fees. I don't see the relevancy of it in any way whatsoever.

The Court: The objection is overruled. It is with relation to the application of O'Melveny & Myers and Mr. FitzPatrick who appear in this class action wherein they originally designated six building and loan associations as the members of the class who were the committee suing for the whole class.

(Testimony of Hubert T. Morrow.)

Did you have an objection, Mr. Angell?

Mr. Angell: Yes, I want to state the full objection.

I object to it on the ground it is incompetent, irrelevant and immaterial, not within any issue presented by the applications pending before the court at this time.

The Court: Overruled. [53]

The Witness: Well, every risk that a lawyer takes he should be paid extra for it. Does that answer it?

Mr. Chapman: That answers it, Mr. Morrow.

Q. Was that one of the risks that you considered in this amount that you had given in your opinion? A. No, I did not.

Mr. Bishop: Just a minute. I object to that. It isn't evident what risk you are talking about.

Mr. Chapman: The one I referred to in the previous question.

The Court: The objection is overruled. Your answer was what?

The Witness: I did not take it into consideration. I might raise the fee a little on account of the risk.

Q. (By Mr. Chapman): Assume that previous applications for attorney's fees had been made in this or consolidated litigation and that the award of a sum on account of such attorney's fees resulted in a writ in the United States Supreme Court against the judge who made such allowance, assume that the writ was denied after which the judge signed the

(Testimony of Hubert T. Morrow.)

order making such allowance, and then an appeal was taken from that order, notwithstanding the denial of the writ, that a stay was sought from the award made after the denial of the writ by the United States Supreme Court, and that stay was likewise argued in the Ninth Circuit Court of [54] Appeals and there denied, and that thereafter the appeal to the Ninth Circuit Court of Appeals was dismissed, would that previous history of litigation over attorneys' fees in your opinion affect the value or be a factor weighing in the amount to be allowed to other attorneys seeking attorneys' fees in the same or similar litigation?

Mr. Angell: Same objection.

The Court: Same ruling.

By that what you are trying to say, is that a factor that if the attorney were allowed a fee he might have to wait a long time for it through successive or several or separate appeals?

Mr. Chapman: Wait half his lifetime, to be exact, your Honor.

The Court: Was that taken into consideration?

The Witness: Is that what your question means?

Mr. Chapman: That is right.

The Witness: I didn't know it, but the answer is, one should take it into consideration.

The Court: Did you in this matter?

The Witness: Yes, sir, I think in my contingency general factor of one-fourth which I added. I may not have made a good estimate when

(Testimony of Hubert T. Morrow.)

I said one-fourth, maybe it should be more or maybe less, but I tried to give consideration to such factors, Mr. Chapman, as you have mentioned. [55]

Q. (By Mr. Chapman): You feel, Mr. Morrow, that your one-fourth allowance for contingency is a sufficient allowance in view of the possibility of never receiving any fee after four years of services?

A. Well, I would say it is low, I say it is a low figure, and I used low figures all the way through to try to act as though I were a referee or not give any benefit to the gentlemen who asked me to testify. Perhaps I am on the low side all the way through, including that element.

The Court: If you do not stay on the low side, I will say this, from this side of the bench, the figures in this litigation get rather startling.

The Witness: Yes, they do.

Q. (By Mr. Chapman): In one of your answers on direct examination, or perhaps it was on cross-examination by the other counsel, you mentioned a 5-hour working day or a 25-hour week for attorneys. Mr. Morrow, would you feel that if actually 60 or 70 hours a week were expended that any different figure should be allowed for that kind of pressure work?

A. Well, in using that I used that in connection only with estimating what a man working in an ordinary manner and not under great pressure—that is the way he should work—should be entitled to earn and gross in a year, $60,000. [56]

Now if you take the other basis, the check hour

(Testimony of Hubert T. Morrow.)

basis, of course if a man wants to work 20 hours a day he gets that many more hours.

The Court: What if the judge keeps him here until midnight, 9:00 o'clock, 11:00 o'clock in the morning?

The Witness: That is so unusual that only lately have I read of anything like that occurring, your Honor.

The Court: Well, what if it did happen, would that be an additional factor to take into consideration?

The Witness: Yes, sir, I think that if your Honor should undertake to work a man so hard that he makes trouble at home and things like that, it should be figured in some way.

The Court: Nobody worries about the judge's home.

The Witness: I did a while ago. I said I was sorrier for you than I was for the attorneys.

The Court: The long and short of your answer is that you figured five hours a day and ordinary, normal working hours.

The Witness: Yes, sir.

The Court: And did not take into consideration high-pressure work over long periods of time?

The Witness: No, sir.

The Court: I think in one of the months here, in Mr. FitzPatrick's or Mr. Fussell's affidavit, one of the months you showed a total of—how many hours? [57]

Mr. FitzPatrick: Around 89.

(Testimony of Hubert T. Morrow.)

The Court: One of them was 160 some-odd hours, I think.

Mr. Fussell: I can't remember. I will answer you in just a moment.

The Court: Anyhow, the record shows what it shows.

The Witness: Your Honor, I did figure in this extreme type of litigation and all the concurrent, concomitant difficulties that there would be an extreme pressure, yes, but I used a conservative basis, I think.

Mr. Chapman: Your Honor, could I have the response that we just filed? I think it is among the papers on your desk.

The Court: It was filed in duplicate?

Mr. Chapman: Yes.

(The document referred to was passed to counsel.)

Q. (By Mr. Chapman): Mr. Morrow, I am directing your attention to an exhibit attached to the response of the plaintiffs, the third party plaintiff Long Beach Federal, to the application re attorneys' fees.

A. Is that the one in July?

Q. No, that was filed just today, Mr. Morrow, and the exhibit is headed "Report of the Select Committee to Investigate Executive Agencies, Tenth Intermediate Report." Had that come to your attention in connection with the opinion you have given on these fee applications? [58]

(Testimony of Hubert T. Morrow.)

A. I think it is the same thing. Wasn't the hearing in July of that year?

Q. That is right. June I think it was, Mr. Morrow.

A. June and July, I think. I have read it. I have read it twice.

Q. That answers that question.

Mr. Works: Your Honor, I think the averment that the court has in mind is the one appearing at page 46 of the original affidavit wherein it states that the total time spent by Mr. FitzPatrick in June, 1946, amounted to over 183 hours. I think that is probably the figure you had in mind.

The Court: I had forgotten. I thought it was either 140 or 160.

Q. (By Mr. Chapman): Mr. Morrow, did you give any consideration in your opinion to the source of the funds from which these fees would be allowed or paid?

The Court: I do not understand that question. Maybe Mr. Morrow does.

Mr. Chapman: Let's rephrase it. I certainly want the court to understand it.

Q. Did you give any consideration, Mr. Morrow, to the fact that the applications for an allowance from funds on deposit in the registry of this court, funds brought here by various of the lawyers party to this litigation, as a result [59] of adversary proceedings?

(Testimony of Hubert T. Morrow.)

Mr. Works: May I amend your question, "or as the court may otherwise direct"?

Mr. Chapman: I don't understand the amendment, your Honor.

Mr. Works: You are referring, as I understand it, to funds on deposit in the registry of the court. We have requested allowance be paid either out of funds on deposit in the registry of the court or as the court may otherwise direct.

The Court: No, the question was not that; his question was, did he give consideration——

Mr. Chapman: To the possibility that it would be paid out of the funds in the registry of the court brought here by the attorneys.

The Court: That is what I understood his question to mean.

Mr. Works: Very well.

The Witness: Do you mind if I ask a question to clarify that?

Mr. Chapman: Go right ahead.

The Court: Let me suggest that I think I know what he is driving at. In other words, that the lawyer produced a sum of money in court which up to now totals approximately $14 million in cash and securities. [60]

The Witness: Now, sir, I did not. I would consider that that would be an element of success in their effort, which I have not included in arriving at my estimate at all.

Q. (By Mr. Chapman): Of course we don't

(Testimony of Hubert T. Morrow.)

know whether it is success or not. It is only up to the court now.

A. I mean, if it were paid I have not given any consideration to any question of success or failure. Generally in a lawsuit when one is trying to fix fees they have the advantage of knowing that the lawyer has made a certain accomplishment, and that is taken into consideration in fixing a fee. But here I have left out entirely out of my opinion any question of accomplishment. So I will say I have not, in answer to your question, I have not taken it into consideration.

Mr. Chapman: No further questions.

The Court: Mr. Westover?

Mr. Westover: No further questions.

The Court: Mr. Sutter?

Mr. Sutter: No further questions on behalf of Title Service.

The Court: Mr. Gilbert?

Mr. Gilbert: None, your Honor.

The Court: Redirect?

Mr. Works: No redirect, your Honor.

The Court: Does anybody else have any questions to ask [61] Mr. Morrow? (No response.)

You may be excused. Thank you very much.

(Witness excused.)

Mr. Gilbert: I assume you have no other witnesses?

Mr. Works: No, that is all.

Mr. Gilbert: I had prepared a hypothetical question——

The Court: Just a moment. Do you rest on your petition?

Mr. Works: We have no further evidence to offer, your Honor.

The Court: Very well.

Mr. Works: We are proceeding, of course, on the assumption that inasmuch as the affidavits are not controverted to the rendition of service that they stand as evidence in the matter.

The Court: The affidavits that are offered in support of the petition will be deemed to be in evidence.

Mr. Works: We will so offer them, your Honor.

The Court: Very well. Then I think perhaps they had better be marked with some kind of a number. It is a verified petition?

Mr. Works: It is an affidavit.

The Court: There is a motion and it is supported by affidavits?

Mr. Works: A motion supported by affidavits; that is right. [62]

The Court: And the original motion was filed when?

Mr. Works: I don't have the filing date of these copies, your Honor. Let me look. January 6, 1949, I understand, your Honor. The supplement was July 8, 1949, as I recall.

The Court: The original motion, together with accompany affidavits, is admitted in evidence as Exhibit 2-27-50-2; and the supplemental motion

filed July 8, 1949, is No. 3 with the same key numbers.

(The documents referred to were received in evidence as Petitioner O'Melveny & Myers and Fitzpatrick Exhibits Nos. 2-27-50-2 and 2-27-50-3.)

The Court: Now do you rest on the petition for fees?

Mr. Works: On the petition for fees; yes, your Honor.

The Court: Is there evidence offered by the San Francisco Bank, the official defendants, or anybody else?

Mr. Bishop: We ask, by the same token, that our affidavits that were filed today, that is, the affidavit of Frank Noon, which is attached to our opposition, as well as the affidavit of Irving Bogardus, be deemed as admitted in evidence.

The Court: Let me see. I had that affidavit here.

In any event, is your answer verified? (Examining document.) It is not.

The defendants offer in evidence, and they are received in evidence, the affidavit of Frank C. Noon, dated February 24, 1950, and filed February 27, 1950, attached to the answer [63] in opposition to the Federal Home Loan Bank, which is admitted in evidence as 2-27-50-A, and the affidavit of Irving Bogardus, filed February 27 and verified February 25, 1950, is likewise received in evidence as the defendant San Francisco Bank's exhibit.

Mr. Angell: Pardon me. I couldn't hear you.

The Court: The affidavit of Mr. Noon will be admitted as Exhibit 2-27-50-A and the affidavit of Bogardus will be admitted as Exhibit 2-27-50-B for the defendant bank only.

Mr. Angell: That is satisfactory.

The Court: The defendant San Francisco Bank only.

Mr. MacGuineas: Well, the official defendants would like to adopt that evidence as being on their behalf also.

The Court: Very well. That is admitted by the same numbers, A and B for the defendant San Francisco Bank and the so-called official defendants.

(The documents referred to were received in evidence as Defendant San Francisco Bank and Official Defendants Exhibit Nos. 2-27-50-A and 2-27-50-B.)

The Court: Now is there any other opposition evidence?

Mr. MacGuineas: Yes, your Honor.

In connection with the opposition filed on behalf of the official defendants on September 23, 1949, there were attached thereto——

Mr. Chapman: Your Honor, could I inquire if we are going to have a recess this afternoon? [64]

The Court: Yes. We will have a short recess.

(Short recess.)

Mr. Bishop: Your Honor please——

The Court: Mr. Bishop, the clerk is not here. Is

it agreeable to counsel that we can proceed without him?

Mr. Gilbert: It is with me.

Mr. Bishop: Mr. Chapman isn't here either, nor Mr. Works or Mr. Fussell.

The Court: Will someone please get them.

The record will show counsel are now present.

I would like to say to counsel that I do not have any matters on the calendar tomorrow or the following day so that I do not feel that everyone need be under the pressure of trying to dispose of this matter today.

And in connection with the matter of the application of fees of O'Melveny & Myers and Richard FitzPatrick, I was discussing with the court reporter the question as to whether or not the affidavits referred to should be copied into the record and deemed read. I will state that I have read them. What is the pleasure of counsel in that respect? Ordinarily, if this were the only thing pending and these were the only files I do not think it would be necessary to do so, but in connection with paging the record, which the clerk is now getting up for the appeal from the interim injunction order, the paging now exceeds 13,000 pages and will in all [65] likelihood exceed 15,000 pages, so that from time to time in referring back to matters it sometimes takes an hour or an hour and a half to find a document which you are looking for in connection with a particular matter.

I will leave it up to counsel as to whether or not

they want those documents copied into the transcript at this point or at the point they were offered.

Mr. Works: I haven't discussed this with counsel, but I think that would be the wise thing to do, your Honor.

The Court: In that way your transcript will practically be your complete record except for services.

Mr. Works: Yes, I would be happy to follow that procedure.

The Court: What is the view of the defendants?

Mr. Bishop: Your Honor, we are willing to stipulate that the affidavits that are the subject of discussion here be deemed to have been read into the record.

The Court: And copied into the transcript of the record by the reporter?

Mr. Bishop: That is correct.

Mr. Works: To be physically copied.

The Court: To be physically copied.

Very well. Therefore the order is made.

Mr. Bishop: In that connection, we would also like to have in that same record the other affidavit of Mr. Bogardus [66] which was attached to the original opposition as filed by us in O'Melveny & Myers' application for fees.

The Court: Let me find that original application now. You say that was filed September——

Mr. Bishop: 9——

The Court: 1949?

Mr. Bishop: Yes, sir. The last page of the opposition, the very last.

The Court: I have gotten up to September 12th and I have not found it yet, commencing from September 1st.

Mr. Bishop: My copy is dated September 15th, but that is when I received service of it.

The Court: There is one filed by James M. Carter, United States Attorney, September 3rd, memorandum in opposition to motions for orders directing payment of attorneys' fees on account and repayment of moneys advanced and supplement thereto, which has attached to it an affidavit of J. Francis Moore.

Mr. MacGuineas: Your Honor, those are the affidavits I was about to offer. If you have them before you I will be happy to make my offer now.

Mr. Angell: The affidavit in question is just a single page attached to the opposition and is the affidavit of Irving Bogardus.

The Court: I have found this, and attached also is the [67] affidavit of Ernest E. Reardon, with its exhibits.

Mr. MacGuineas: The exhibits to both affidavits I should like to have offered in evidence.

The Court: Very well. The affidavit of J. Francis Moore and Ernest E. Reardon, the affidavit of J. Francis Moore dated the 21st day of September 1949 and sworn to before Paul Peiffer, Jr., Notary Public, with the exhibits, and the affidavit of Ernest E. Reardon, sworn to on the 20th day of September, 1949, before Paul Peiffer, Jr., and its exhibits, both being pages numbered now of the record 9850 to 9883 inclusive, and attached to the memorandum

in opposition to motion for orders directing payment of attorneys' fees on account and repayment of moneys advanced and supplements thereto filed in this court on September 23, 1949 are received in evidence and may be deemed to be read in evidence and copied into the record as Exhibit 2-27-50-C for Moore, and 2-27-50-D for Reardon.

For all defendants?

Mr. Angell: Yes, sir.

The Court: Very well.

(The documents referred to were received in evidence as Defendants' Exhibits 2-27-50-C and 2-27-50-D.)

(The document referred to is, in words and figures, as follows, to wit:) [68]

* * *

The Court: I do not find that, Mr. Bishop.

Mr. Bishop: Could I see the file, please?

The Court: This is July 28, 1949, to October 10, 1949.

(The document referred to was passed to counsel.)

Mr. Chapman: While your Honor is on the subject of affidavits——

The Court: Just a moment. Let us get one thing in at a time here.

Your Exhibit No. 1 I am putting in the transcript, too.

Mr. Works: Thank you, your Honor. [119]

Mr. Bishop: There must be some other file, be-

cause Mr. Works has the same problem that we have, that their affidavit of Mr. FitzPatrick isn't here, and our opposition isn't even here.

The Court: Maybe somebody forgot to file them.

Mr. Bishop: No, they were served and filed, your Honor.

Mr. Works: We are going to simplify our matter by asking leave to file a duplicate, if we may.

The Court: An affidavit of FitzPatrick?

Mr. Works: Yes, your Honor.

The Court: It seems to me that I read two or three of them Saturday.

Mr. Works: Perhaps so. It doesn't appear to be in this file, however. It may be in some other file.

The Court: Mr. Reporter, the affidavit and motion referred to as Petitioners' Exhibit 2-27-50-2 is from pages 8207 to 8287 of the record and was filed in this court on January 6, 1949, which consists of the motion, a very short statement of points and authorities, the affidavit of Pierce Works and John Whyte and the affidavit of Richard FitzPatrick.

It is not necessary to put in these affidavits of service by mail?

Mr. Works: No.

(The document referred to is, in words and figures, as follows, to wit:) [120]

PETITIONERS' EXHIBIT No. 2-27-50-2

RICHARD FITZPATRICK,
756 South Broadway,
Los Angeles 14, California,
TUcker 1576,

O'MELVENY & MYERS,
433 South Spring Street,
Los Angeles 13, California,
MIchigan 2611,
Attorneys for Plaintiffs in Civil Action No. 5678-PH (WM) and Attorneys for Defendant, Third-Party Defendant, Cross-Claimant and Cross-Defendant Federal Home Loan Bank of Los Angeles, a body corporate, in Civil Action No. 5421-PH.

In the District Court of the United States for the Southern District of California, Central Division

Civil Action No. 5678-PH (WM)
(Consolidated With Civil Action No. 5421-PH)

FEDERAL HOME LOAN BANK OF LOS ANGELES, a Body Corporate; COAST FEDERAL SAVINGS AND LOAN ASSOCIATION, an Incorporated Association; STANDARD FEDERAL SAVINGS AND LOAN ASSOCIATION, an Incorporated Association; FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF WILMINGTON, an Incorporated Association; CENTRAL BUILDING AND LOAN ASSOCIATION, an In-

Petitioners' Exhibit No. 2-27-50-2—(Continued)

corporated Association; STATE SAVINGS AND LOAN ASSOCIATION, an Incorporated Association; LOS ANGELES AMERICAN SAVINGS & LOAN ASSOCIATION, an Incorporated Association,

Plaintiffs,

vs.

FEDERAL HOME LOAN BANK OF PORTLAND, Sometimes Known and Referred to as Federal Home Loan Bank of San Francisco, a Body Corporate; JOHN H. FAHEY, Individually; HOME LOAN BANK BOARD, a Board Functioning Under the Authority of Presidential Reorganization Plan 3 of 1947; WILLIAM K. DIVERS, Chairman; J. ALSTON ADAMS and O. K. LA ROQUE, as Regular Members of the HOME LOAN BANK BOARD, and Each of Them; ONE DOE, TWO DOE, THREE DOE, FOUR DOE, FIVE DOE, SIX DOE, SEVEN DOE, EIGHT DOE, NINE DOE, TEN DOE, ELEVEN DOE, TWELVE DOE, THIRTEEN DOE, FOURTEEN DOE, FIFTEEN DOE, and SIXTEEN DOE,

Defendants.

PAUL MALLONEE, et al.,

Plaintiffs,

vs.

JOHN H. FAHEY, et al.,

Defendants.

Petitioners' Exhibit No. 2-27-50-2—(Continued)

MOTION FOR ORDER DIRECTING PAYMENT OF ATTORNEYS' FEES ON ACCOUNT

Plaintiffs herein, and each of them, move the above-entitled Court as follows:

1. That an order be made and entered by the above-entitled Court in the above-entitled consolidated civil actions fixing reasonable attorneys' fees on account for legal services already rendered in said actions, and both of them, from and after April 1, 1946, to and including October 31, 1948, and to be rendered in the future conduct of said actions, or [122] either of them, by Richard FitzPatrick, Esq., and Messrs. O'Melveny & Myers, attorneys-at-law, for and on behalf of plaintiffs, or any of them, in Civil Action No. 5678-PH (WM), and for and on behalf of defendant, third-party defendant, cross-claimant, and cross-defendant Federal Home Loan Bank of Los Angeles, a body corporate, in Civil Action No. 5421-PH.

2. That said order shall direct the clerk of the above-entitled Court to pay the amount of attorneys' fees so fixed by said Court to said Richard FitzPatrick, Esq., and Messrs. O'Melveny & Myers out of the funds, assets, or properties now on deposit in the registry of said Court in said consolidated civil actions, or as said Court shall otherwise direct.

Said motion will be made upon both and each of the following grounds:

Petitioners' Exhibit No. 2-27-50-2—(Continued)

1. That Federal Home Loan Bank of Los Angeles, a body corporate (hereinafter referred to as "Los Angeles Bank"), plaintiff in Civil Action No. 5678-PH (WM), and defendant, third-party defendant, cross-claimant, and cross-defendant in Civil Action No. 5421-PH, has no funds with which to pay its attorneys, Messrs. O'Melveny & Myers and Richard FitzPatrick, Esq., either for services already rendered or to be rendered by said attorneys for and on its behalf in said actions, or either of them, since all of its assets are in the possession of Federal Home Loan Bank of Portland, sometimes known and [123] referred to as Federal Home Loan Bank of San Francisco, a body corporate, one of the defendants in Civil Action No. 5678-PH (WM); hence, a denial to Los Angeles Bank of the use of any portion of said assets with which to pay attorneys' fees would in effect preclude Los Angeles Bank from further prosecuting or defending in good faith said actions, or either of them.

2. That plaintiffs Coast Federal Savings and Loan Association, an incorporated association (hereinafter referred to as "Coast Federal"); Standard Federal Savings and Loan Association, an incorporated association (hereinafter referred to as "Standard Federal"); First Federal Savings and Loan Association of Wilmington, an incorporated association (hereinafter referred to as "First Federal"); Central Building and Loan Association, an incorporated association (hereinafter referred to as

Petitioners' Exhibit No. 2-27-50-2—(Continued)

"Central"); State Savings and Loan Association, an incorporated association (hereinafter referred to as "State"), and Los Angeles American Savings & Loan Association, an incorporated association (hereinafter referred to as "Los Angeles American"), and each of them, in Civil Action No. 5678-PH (WM), have a beneficial interest in the assets of Los Angeles Bank now in the possession of said defendant Federal Home Loan Bank of Portland sufficient to entitle them, and each of them, to the payment out of said assets of the fees of their attorneys, Messrs. O'Melveny & Myers and [124] Richard FitzPatrick, Esq., in said actions, and both of them.

Said motion will be based upon all of the pleadings, papers and files in the above-entitled consolidated actions, and upon the memorandum of points and authorities and the affidavits of Pierce Works and John Whyte, Esqs., and Richard FitzPatrick, Esq., attached hereto.

Dated: January 5, 1949.

RICHARD FITZPATRICK,
O'MELVENY & MYERS,
PIERCE WORKS, and
JOHN WHYTE,

By /s/ PIERCE WORKS,

Attorneys for Plaintiffs in Civil Action No. 5678-PH (WM), and Attorneys for Defendant, Third-Party Defendant, Cross-Claimant, and Cross-Defendant Los Angeles Bank in Civil Action No. 5421-PH.